



## **COMMODITY FUTURES TRADING COMMISSION**

### **17 CFR Part 150**

### **RIN 3038-AD82**

#### **Aggregation of Positions**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commodity Futures Trading Commission (“Commission” or “CFTC”) is issuing a final rule to amend part 150 of the Commission’s regulations with respect to the policy for aggregation under the Commission’s position limits regime for futures and option contracts on nine agricultural commodities. The Commission notes that if its proposed position limits regime for other exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts are finalized, these amended regulations would also apply to the position limits regime for those contracts and swaps.

**DATES:** The effective date for this final rule is **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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#### **I. Background**

The Commission has long established and enforced speculative position limits for futures and options contracts on various agricultural commodities as authorized by the Commodity Exchange Act (“CEA”).<sup>1</sup> The part 150 position limits regime<sup>2</sup> generally includes three components: (1) the level of the limits, which set a threshold that restricts the number of speculative positions that a person may hold in the spot-month, individual

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<sup>1</sup> 7 U.S.C. 1 *et seq.*

<sup>2</sup> See 17 CFR part 150. Part 150 of the Commission’s regulations establishes federal position limits on certain enumerated agricultural contracts; the listed commodities are referred to as enumerated agricultural commodities. The Commission has proposed to amend its position limits to also encompass other exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts. See Position Limits for Derivatives, 78 FR 75680 (Dec. 12, 2013).

month, and all months combined,<sup>3</sup> (2) exemptions for positions that constitute bona fide hedging transactions and certain other types of transactions,<sup>4</sup> and (3) rules to determine which accounts and positions a person must aggregate for the purpose of determining compliance with the position limit levels.<sup>5</sup>

The Commission's existing aggregation policy under regulation 150.4 generally requires that unless a particular exemption applies, a person must aggregate all positions and accounts for which that person controls the trading decisions with all positions and accounts in which that person has a 10 percent or greater ownership interest, and with the positions of any other persons with which the person is acting pursuant to an express or implied agreement or understanding.<sup>6</sup> The scope of exemptions from aggregation include the ownership interests of limited partners in pooled accounts,<sup>7</sup> discretionary accounts and customer trading programs of futures commission merchants ("FCM"),<sup>8</sup> and eligible entities with independent account controllers ("IAC") that manage customer positions.<sup>9</sup> Market participants claiming one of the exemptions from aggregation are subject to a call by the Commission for information demonstrating compliance with the conditions applicable to the claimed exemption.<sup>10</sup>

The Commission adopted aggregation rules in 2011, as part of its adoption of part 151 of its regulations, that were largely similar to the existing aggregation policy under

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<sup>3</sup> See 17 CFR 150.2.

<sup>4</sup> See 17 CFR 150.3.

<sup>5</sup> See 17 CFR 150.4.

<sup>6</sup> See 17 CFR 150.4(a) and (b).

<sup>7</sup> See 17 CFR 150.4(c).

<sup>8</sup> See 17 CFR 150.4(d).

<sup>9</sup> See 17 CFR 150.3(a)(4).

<sup>10</sup> See 17 CFR 150.3(b) and 150.4(e).

regulation 150.4.<sup>11</sup> In 2012, the Commission proposed to amend the aggregation rules in part 151.<sup>12</sup> Prior to finalization of the 2012 amendments, however, part 151 of the Commission's regulations was vacated by court order.<sup>13</sup>

In November 2013, the Commission proposed to amend the existing aggregation rules in regulation 150.4, and certain related regulations, to modify rules to determine which accounts and positions a person must aggregate.<sup>14</sup> This proposal and the related notice of proposed rulemaking are referred to herein as the "Proposed Rule." The Proposed Rule was substantially similar to the aggregation rules that had been adopted in part 151 of the Commission's regulations in 2011, as they were proposed to be amended in May 2012.<sup>15</sup> After reviewing public comments on the Proposed Rule, the Commission supplemented it with a limited revision in September 2015 that would permit the disaggregation of positions of owned entities in expanded circumstances.<sup>16</sup> This supplement to the proposal and the related supplemental notice of proposed rulemaking are referred to herein as the "Supplemental Notice."

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<sup>11</sup> See Position Limits for Futures and Swaps, 76 FR 71626 (Nov. 18, 2011). With regard to determining which accounts and positions a person must aggregate, regulation 151.7 (now vacated, see footnote 13, below) implemented the Commission's existing aggregation policy under regulation 150.4 and also provided additional exemptions for underwriters of securities, and for where the sharing of information between persons would cause either person to violate federal law or regulations adopted thereunder. With the exception of the exemption for underwriters, vacated regulation 151.7 required market participants to file a notice with the Commission demonstrating compliance with the conditions applicable to each exemption.

<sup>12</sup> See Aggregation, Position Limits for Futures and Swaps, 77 FR 31767 (May 30, 2012).

<sup>13</sup> See International Swaps and Derivatives Association v. United States Commodity Futures Trading Commission, 887 F. Supp. 2d 259 (D.D.C. 2012). The revised position limit levels in amended section 150.2 were not vacated.

<sup>14</sup> See Aggregation of Positions; Proposed Rule, 78 FR 68946 (Nov. 15, 2013).

<sup>15</sup> See Proposed Rule, 78 FR at 68947-48.

<sup>16</sup> See Aggregation of Positions: Supplemental notice of proposed rulemaking, 80 FR 58365 (Sept. 29, 2015).

## II. Final Rules

The Commission is adopting the amendments to its aggregation rules in regulation 150.4, and certain related regulations, as set forth in the Proposed Rule and modified in the Supplemental Notice, with certain further changes made in response to public comments. The amendments and the public comments relevant to each amendment are discussed below.<sup>17</sup>

### A. Aggregation on the Basis of Ownership or Control of Positions in Rule 150.4(a)(1) and Related Exemption from Aggregation in Rule 150.4(b)(2)

#### 1. Proposed Approach

The Proposed Rule reflected the Commission's long-standing incremental approach to exemptions from the aggregation requirement for persons owning a financial interest in an entity. The Proposed Rule highlighted the relevant statutory language of section 4a(a)(1) of the CEA, which requires aggregation of an entity's positions on the basis of either ownership or control of the entity, and the related legislative history and regulatory developments which support the Commission's approach.<sup>18</sup> In addition, the Proposed Rule explained that the Commission's historical practice has been to craft narrowly-tailored exemptions, when and if appropriate, to the basic requirement of aggregation when there is either ownership or control of an entity. On this basis, proposed rule 150.4(a)(1) would maintain the requirement in existing regulation 150.4(b) that all positions in accounts for which any person, by power of attorney or otherwise,

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<sup>17</sup> The public comments on the Proposed Rule and the Supplemental Notice are available at <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1620>.

<sup>18</sup> See Proposed Rule, 78 FR at 68956, citing 7 U.S.C. 6a(a)(1) ("In determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person").

directly or indirectly, controls trading or holds a 10 percent or greater ownership or equity interest be aggregated with the positions held and trading done by such person.

To explain the basis for maintaining the existing 10 percent threshold level, the Commission noted that it has generally found that an ownership or equity interest of less than 10 percent in an account or position that is controlled by another person who makes discretionary trading decisions does not present a concern that such ownership interest results in control over trading or can be used indirectly to create a large speculative position through ownership interests in multiple accounts.<sup>19</sup> As such, the Commission has exempted an ownership interest below 10 percent from the aggregation requirement, while requiring aggregation when there is an ownership interest above 10 percent.<sup>20</sup> Prior comments, discussed in the Proposed Rule, had advocated that an ownership interest of 10 percent or more should also be exempt from the aggregation requirement, so long as such ownership represents a passive investment that does not involve control of the trading decisions of the owned entity.<sup>21</sup> The prior commenters had asserted that such passive investments would be unlikely to allow the owner to directly or indirectly control the trading of the owned entity, and therefore would be unlikely to present a risk that persons would be able to hold an unduly large overall position through positions in multiple accounts.<sup>22</sup>

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<sup>19</sup> See Proposed Rule, 78 FR at 68958.

<sup>20</sup> The Commission codified this aggregation threshold in its 1979 statement of policy on aggregation, which was derived from the administrative experience of the Commission's predecessor. See Statement of Policy on Aggregation of Accounts and Adoption of Related Reporting Rules, 44 FR 33839, 33843 (June 13, 1979) ("1979 Aggregation Policy"). Note, however, that proposed rule 150.4(a)(2) would also separately require aggregation of investments in accounts with substantially identical trading strategies.

<sup>21</sup> See Proposed Rule, 78 FR at 68951.

<sup>22</sup> See *id.*

Responding to these prior comments, the Commission explained in the Proposed Rule that it had previously considered, but not adopted, a broad passive investment exemption from the aggregation requirement, and had instead generally restricted exemptions based on ownership to those for FCMs, limited partner investors in commodity pools, and IACs managing customer funds for an eligible entity.<sup>23</sup> Further, the Proposed Rule reiterated the Commission's belief in incremental development of aggregation exemptions over time.<sup>24</sup> Consistent with that incremental approach, the Proposed Rule maintained the 10 percent threshold in the existing regulation but proposed to adopt specific, tailored relief from the ownership criteria of aggregation for certain situations.

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<sup>23</sup> See *id.*, citing Exemptions from Speculative Position Limits for Positions which have a Common Owner but which are Independently Controlled and for Certain Spread Positions; Proposed Rule, 53 FR 13290, 13292 (Apr. 22, 1988). The 1988 proposal for the independent account controller rule requested comment on the possibility of a broader passive investment exemption, and specifically noted:

[Q]uestions also have been raised regarding the continued appropriateness of the Commission's aggregation standard which provides that a beneficial interest in an account or positions of ten percent or more constitutes a financial interest tantamount to ownership. This threshold financial interest serves to establish ownership under both the ownership criterion of the aggregation standard and as one of the indicia of control under the 1979 Aggregation Policy.

In particular, certain instances have come to the Commission's attention where beneficial ownership in several otherwise unrelated accounts may be greater than ten percent, but the circumstances surrounding the financial interest clearly exclude the owner from control over the positions. The Commission is requesting comment on whether further revisions to the current Commission rules and policies regarding ownership are advisable in light of the exemption hereby being proposed. If such financial interests raise issues not addressed by the proposed exemption for independent account controllers, what approach best resolves those issues while maintaining a bright-line aggregation test?

<sup>24</sup> See Proposed Rule, 78 FR at 68951, citing Aggregation, Position Limits for Futures and Swaps, 77 FR 31767, 31773 (May 30, 2012). This incremental approach to account aggregation standards reflects the Commission's historical practice. See, e.g., Exemptions from Speculative Position Limits for Positions Which Have a Common Owner But Which are Independently Controlled and for Certain Spread Positions; Final Rule, 53 FR 41563, 41567 (Oct. 24, 1988) (the definition of eligible entity for purposes of the IAC exemption originally only included commodity pool operators ("CPOs"), or exempt CPOs or pools, but the Commission indicated a willingness to expand the exemption after a "reasonable opportunity" to review the exemption.); Exemption From Speculative Position Limits for Positions Which Have a Common Owner, But Which Are Independently Controlled, 56 FR 14308, 14312 (Apr. 9, 1991) (the Commission expanded eligible entities to include commodity trading advisors, but did not include additional entities requested by commenters until the Commission had the opportunity to assess the current expansion and further evaluate the additional entities); and Revision of Federal Speculative Position Limits and Associated Rules, 64 FR 24038 (May 5, 1999) ("1999 Amendments") (the Commission expanded the list of eligible entities to include many of the entities commenters requested in the 1991 rulemaking).

a. Initial Ownership Threshold for Disaggregation Relief in the Proposed Rule

The Proposed Rule included two tiers of relief from the ownership criteria of aggregation – relief on the basis of a notice filing, effective upon submission, by persons holding an interest of between 10 percent and 50 percent in an owned entity, and relief on the basis of an application by persons holding an interest of more than 50 percent in an owned entity.<sup>25</sup> Each of these procedures for relief in the Proposed Rule is described briefly below.

The Proposed Rule set out a notice filing procedure, effective upon submission, to permit a person with either an ownership or an equity interest in an owned entity of 50 percent or less to disaggregate the positions of an owned entity in specified circumstances, even if such person has a 10 percent or greater interest in the owned entity.<sup>26</sup> The notice filing would have to demonstrate compliance with certain conditions set forth in proposed rule 150.4(b)(2)(i). Similar to other exemptions from aggregation, the notice filing would be effective upon submission to the Commission, but under proposed rule 150.4(c) the Commission would be able to subsequently call for additional information, and to amend, terminate or otherwise modify the person's aggregation exemption for failure to comply with the provisions of proposed rule 150.4(b)(2). Further, the person would be obligated by proposed rule 150.4(c) to amend the notice filing in the event of a material change to the circumstances described in the filing.

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<sup>25</sup> See Proposed Rule, 78 FR at 68958-61.

<sup>26</sup> Under the Proposed Rule, and in a manner similar to current regulation, if a person qualifies for disaggregation relief, the person would nonetheless have to aggregate those same accounts or positions covered by the relief if they are held in accounts with substantially identical trading strategies. See proposed rule 150.4(a)(2). The exemptions in proposed rule 150.4 were set forth as alternatives, so that, for example, the applicability of the exemption in paragraph (b)(2) would not affect the applicability of a separate exemption from aggregation (e.g., the independent account controller exemption).



In the Proposed Rule, the Commission stated its preliminary belief that a 50 percent limit on the ownership interest in another entity is a reasonable, “bright line” standard for determining when aggregation of positions is required, even where the ownership interest is passive.<sup>27</sup> In the Proposed Rule, the Commission explained that majority ownership (i.e., over 50 percent) is indicative of control, and this standard addresses the Commission’s concerns about circumvention of position limits by coordinated trading or direct or indirect influence between entities. For these reasons, the Commission preliminarily believed that the 50 percent limit would be appropriate to address the heightened risk of direct or indirect influence over the owned entity and therefore a threshold at this level would be a reasonable approach to the aggregation of owned accounts pursuant to Section 4a(a)(1) of the CEA.<sup>28</sup>

With respect to a person who has a greater than 50 percent ownership or equity interest in the owned entity, proposed rule 150.4(b)(3) included disaggregation relief in limited situations where the owned entity is not required to be, and is not, consolidated on the financial statement of the person, if the person can demonstrate that the person does not control the trading of the owned entity, based on the criteria in proposed rule 150.4(b)(2)(i), and if both the person and the owned entity have procedures in place that are reasonably effective to prevent coordinated trading.

Under proposed rule 150.4(b)(3), a person with a greater than 50 percent ownership of an owned entity would have to apply on a case-by-case basis to the Commission for permission to disaggregate, and await the Commission’s decision as to whether certain conditions specified in the proposed rule had been satisfied and therefore

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<sup>27</sup> See Proposed Rule, 78 FR at 68959.

<sup>28</sup> See *id.*

disaggregation would be permitted.<sup>29</sup> The person would be required to demonstrate to the Commission that:

- i. the owned entity is not required to be, and is not, consolidated on the financial statement of the person,
- ii. the person does not control the trading of the owned entity (based on criteria in proposed rule 150.4(b)(2)(i)), with the person showing that it and the owned entity have procedures in place that are reasonably effective to prevent coordinated trading in spite of majority ownership,
- iii. each representative of the person (if any) on the owned entity's board of directors attests that he or she does not control trading of the owned entity, and
- iv. the person certifies that either (a) all of the owned entity's positions qualify as bona fide hedging transactions or (b) the owned entity's positions that do not so qualify do not exceed 20 percent of any position limit currently in effect, and the person agrees in either case that:
  - if this certification becomes untrue for the owned entity, the person will aggregate the owned entity for three complete calendar months and if all of the owned entity's positions qualify as bona fide hedging transactions during that time the person would have the opportunity to make the certification again and stop aggregating,

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<sup>29</sup> See Proposed Rule, 78 FR at 68959-61. This approach was consistent with the Commission's preliminary view that relief from the aggregation requirement should not be available merely upon a notice filing by a person who has a greater than 50 percent ownership or equity interest in the owned entity. The Commission explained that, in its view, a person with a greater than 50 percent ownership interest in multiple accounts would have the ability to hold and control a significant and potentially unduly large overall position in a particular commodity, which position limits are intended to prevent. See id.

- upon any call by the Commission, the owned entity(ies) will make a filing responsive to the call, reflecting the owned entity's positions and transactions only, at any time (such as when the Commission believes the owned entities in the aggregate may exceed a visibility level), and
- the person will provide additional information to the Commission if any owned entity engages in coordinated activity, short of common control (understanding that if there were common control, the positions of the owned entity(ies) would be aggregated).

The relief under proposed rule 150.4(b)(3) would not be automatic, but rather would be available only if the Commission finds, in its discretion, that the four conditions above are met. There would be no time limits on the Commission's process for making the determination of whether relief under proposed rule 150.4(b)(3) is appropriately granted, and relief would be available only if and when the Commission acts on a particular request for relief.<sup>30</sup>

b. Ownership Threshold for Disaggregation Relief in the Supplemental Notice

The Supplemental Notice discussed the public comments received on this aspect of the Proposed Rule. In brief, it noted that commenters generally praised the proposed relief for owners of between 10 percent and 50 percent of an owned entity, but commenters asserted that the proposed application procedures under proposed rule 150.4(b)(3) for owners of a more than 50 percent equity or ownership interest were unnecessary and inappropriate.<sup>31</sup> Several commenters said that the Commission should

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<sup>30</sup> See Proposed Rule, 78 FR at 68960.

<sup>31</sup> See Supplemental Notice, 80 FR at 58369.

provide the same disaggregation relief for owners of more than 50 percent of an owned entity as was proposed to be provided for owners of 50 percent or less.<sup>32</sup> On the other hand, the Supplemental Notice noted that a few commenters opposed providing aggregation relief for owners of more than 10 percent of an owned entity.<sup>33</sup>

In view of the points raised by commenters on the Proposed Rule, the Commission proposed in the Supplemental Notice to delete proposed rules 150.4(b)(3) and 150.4(c)(2), and to change proposed rule 150.4(b)(2) so that it would apply to all persons with an ownership or equity interest in an owned entity of 10 percent or greater (i.e., an interest of up to and including 100 percent) in the same manner as proposed rule 150.4(b)(2) would have applied, before this revision, to owners of an interest of between 10 percent and 50 percent.<sup>34</sup> The Commission stated in the Supplemental Notice that, while the language in section 4a of the CEA, its legislative history, subsequent regulatory developments, and the Commission's historical practices in this regard all support aggregation on the basis of either ownership or control of an entity as a necessary part of the Commission's position limit regime,<sup>35</sup> the Commission is also mindful that, as discussed by commenters on the Proposed Rule, aggregation of positions held by owned

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<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> See Supplemental Notice, 80 FR at 58371. The Supplemental Notice also laid out conforming changes in proposed rule 150.4(b)(7), to delete a cap of 50 percent on the ownership or equity interest for broker-dealers to disaggregate, in proposed rule 150.4(e)(1)(i), to delete a delegation of authority referencing proposed rule 150.4(b)(3), and in proposed rule 150.4(c)(1), to delete a cross-reference. See *id.*

<sup>35</sup> See Supplemental Notice, 80 FR at 58372, citing 1999 Amendments, 64 FR at 24044 ("[T]he Commission...interprets the 'held or controlled' criteria as applying separately to ownership of positions or to control of trading decisions."). See also, Exemptions from Speculative Position Limits for Positions which have a Common Owner but which are Independently Controlled and for Certain Spread Positions; Proposed Rule, 53 FR 13290, 13292, (Apr. 22, 1988) (responding to petitions, the Commission proposed the IAC exemption from speculative position limits, but declined to remove the ownership standard from its aggregation policy).

entities may in some cases be impractical, burdensome, or not in keeping with modern corporate structures.

The Commission explained that the modifications in the Supplemental Notice would address comments that ownership of a greater than 50 percent interest in an entity (and the related consolidation of financial statements) may not mean that the owner actually controls day-to-day trading decisions of the owned entity.<sup>36</sup> The Commission stated in the Supplemental Notice that, on balance, the overall purpose of the position limits regime (to diminish the burden of excessive speculation which may cause unwarranted changes in commodity prices) would be better served by focusing the aggregation requirement on situations where the owner is, in view of the circumstances, actually able to control the trading of the owned entity.<sup>37</sup> The Commission reasoned that the ability to cause unwarranted changes in the price of a commodity derivatives contract would result from the owner's control of the owned entity's trading activity, while due to variances in corporate structures there may be instances where one entity has a 100 percent ownership interest in another entity yet does not control day-to-day business activities of the owned entity. In this situation the owned entity would not have knowledge of the activities of other entities owned by the same owner, nor would it raise the heightened concerns, triggered when one entity both owns and controls trading of

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<sup>36</sup> See Supplemental Notice, 80 FR at 58371.

<sup>37</sup> See *id.* The Commission notes in this regard that there may be significant burdens in meeting the requirements of proposed rule 150.4(b)(3) even where there is no control of the trading of the owned entity, as was suggested by the Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce, the Asset Management Group of the Securities Industry and Financial Markets Association and the other commenters. See Supplemental Notice, 80 FR at 58372.

another entity, that the owner would necessarily act in a coordinated manner with other owned entities.<sup>38</sup>

Prior to issuing the Supplemental Notice, the Commission considered the views of commenters who warned that inappropriate relief from the aggregation requirements could allow circumvention of position limits through the use of multiple subsidiaries. However, the Commission believed that the criteria in proposed rule 150.4(b)(2)(i), which must be satisfied in order to disaggregate, will appropriately indicate whether an owner has control of or knowledge of the trading activity of the owned entity, such that if the disaggregation criteria are satisfied, the ability of an owner and the owned entity to act together to engage in excessive speculation should not differ significantly from that of two separate individuals.<sup>39</sup>

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<sup>38</sup> Supplemental Notice, 80 FR at 58371. In the Supplemental Notice, the Commission also considered that aggregation of the positions of majority-owned subsidiaries could require corporate groups to establish procedures to monitor and coordinate trading activities across disparate owned entities, which could have unpredictable consequences including not only the cost of establishing these procedures, but also the impairment of corporate structures which were established to ensure that the various owned entities engage in business independently. On the other hand, the Commission believed that the disaggregation criteria in proposed rule 150.4(b)(2)(i) are in line with prudent corporate practices that are maintained for longstanding, well-accepted reasons with which the Commission did not intend to interfere. See Supplemental Notice, 80 FR at 58372.

In the Proposed Rule, the Commission noted that if the aggregation rules adopted by the Commission would be a precedent for aggregation rules enforced by designated contract markets (“DCMs”) and swap execution facilities (“SEFs”), it would be even more important that the aggregation rules set out, to the extent feasible, “bright line” rules that are capable of easy application by a wide variety of market participants while not being susceptible to circumvention. See Proposed Rule, 78 FR at 68596, n. 103. In the Supplemental Notice, the Commission stated that implementing an approach to aggregation that is in keeping with longstanding corporate practices would promote the goal of setting out “bright line” rules that are relatively easy to apply while not being susceptible to circumvention. See Supplemental Notice, 80 FR at 58372.

<sup>39</sup> See Supplemental Notice, 80 FR at 58371. See also Proposed Rule, 78 FR at 68961, referring to regulation 150.3(a)(4) (proposed to be replaced by proposed rule 150.4(b)(5)). Such conditions have been useful in ensuring that trading is not coordinated through the development of similar trading systems, and that procedures are in place to prevent the sharing of trading decisions between entities. The disaggregation criteria require that the two entities not have knowledge of each other’s trading and, moreover, have and enforce written procedures to preclude such knowledge.

A commenter on the Proposed Rule had said the Commission should eliminate the proposed aggregation exemptions for ownership interests up to 50 percent, because such notices would make it virtually impossible for the Commission to make timely, informed decisions about whether one person in fact controls the trading decisions of another and whether all proffered certifications are accurate.<sup>40</sup> This commenter said that, alternatively, the Commission should only provide aggregation exemptions where the ownership interest is no greater than 25 percent, in order to prevent abusive practices, which should not become effective prior to Commission review of the facts.<sup>41</sup>

The Commission pointed out in the Supplemental Notice that finalization of proposed rule 150.4(b)(2), which would allow persons with ownership or equity interests in an owned entity of up to and including 100 percent to disaggregate the positions of the owned entity if certain conditions were satisfied, would not mean that there would be no aggregation on the basis of ownership. Rather, aggregation would still be the “default requirement” for the owner of a 10 percent or greater interest in an owned entity, unless the conditions of proposed rule 150.4(b)(2) are satisfied.<sup>42</sup>

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<sup>40</sup> See Honorable Carl Levin, United States Senate on February 10, 2014 (“CL-Sen. Levin Feb 10”), see also Americans for Financial Reform on February 10, 2014 (Commission should trigger automatic aggregation for an ownership interest well under 50 percent, because potential aggregation exemptions for ownership interests over 10 percent may undermine the proposed limits).

<sup>41</sup> See CL-Sen. Levin Feb 10.

<sup>42</sup> See Supplemental Notice, 80 FR at 58371. The Commission noted in the Proposed Rule that if there were no aggregation on the basis of ownership, it would have to apply a control test in all cases, which would pose significant administrative challenges to individually assess control across all market participants. See Proposed Rule, 78 FR at 68956. Further, the Commission considered that if the statute required aggregation only if the existence of control were proven, market participants may be able to use an ownership interest to directly or indirectly influence the account or position and thereby circumvent the aggregation requirement. See id. On further review and after considering the comments on the Proposed Rule, the Commission stated in the Supplemental Notice that the disaggregation criteria in proposed rule 150.4(b)(2)(i) provide an effective, easily implemented means of applying a “control test” to determine if disaggregation should be allowed, without creating a loophole through which market participants could circumvent the aggregation requirement. See Supplemental Notice, 80 FR at 58371.

## 2. Commenters' Views

### a. Comments on the Ownership Threshold

The large majority of comments received after the Supplemental Notice was issued supported proposed rule 150.4(b)(2) as it was modified in the Supplemental Notice, and said the Commission should not adopt proposed rule 150.4(b)(3). The commenters said that the modifications described in the Supplemental Notice would provide for a more workable aggregation standard, enhance the Commission's regulatory goals, and focus the Commission's limited resources on only those disaggregation filings which might reasonably warrant additional discretionary review.<sup>43</sup>

Many of the commenters who supported the revisions in the Supplemental Notice had also provided comments on the Proposed Rule to the effect that the Commission should provide the same disaggregation relief for owners of more than 50 percent of an owned entity as was proposed to be provided for owners of 50 percent or less. For example, one commented that the Commission should permit majority-owned affiliates to be disaggregated regardless of whether the entities are required to consolidate financial

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<sup>43</sup> See Electric Power Supply Association on November 13, 2015 ("CL-EPSC Nov 13"); International Swaps and Derivatives Association on November 12, 2015 ("CL-ISDA Nov 12"); Alternative Investment Management Association on November 12, 2015 ("CL-AIMA Nov 12"); Asset Management Group of the Securities Industry and Financial Markets Association ("SIFMA AMG") on November 13, 2015 ("CL-SIFMA AMG Nov 13"); International Energy Credit Association on November 13, 2015 ("CL-IECA Nov 13"); Energy Transfer Partners, L.P., on behalf of itself and Energy Transfer Equity, L.P. on November 13, 2015 ("CL-Energy Transfer Nov 13"); CME Group, Inc. on November 13, 2015 ("CL-CME Nov 13"); Coalition of Physical Energy Companies on November 13, 2015 ("CL-COPE Nov 13"); Commercial Energy Working Group on November 13, 2015 ("C-Working Group Nov 13"); Morgan, Lewis & Bockius LLP on November 13, 2015 ("CL-Morgan Lewis Nov 13"); Sempra Energy on November 13, 2015 ("CL-Sempra Nov 13"); Commodity Markets Council, November 13, 2015 ("CL-CMC Nov 13"); ECOM Agroindustrial Corp., Ltd. on November 13, 2015 ("CL-ECOM Nov 13"); Edison Electric Institute on November 13, 2015 ("CL-EEI Nov 13"); Futures Industry Association ("FIA") on November 13, 2015 ("CL-FIA Nov 13"); Ontario Teachers' Pension Plan on November 13, 2015 ("CL-OTPP Nov 13"); ICE Futures US, Inc. on November 13, 2015 ("CL-ICE Nov 13"); Natural Gas Supply Association on November 13, 2015 ("CL-NGSA Nov 13"); Managed Funds Association on November 12, 2015 ("CL-MFA Nov 12"); Private Equity Growth Capital Council on November 12, 2015 ("CL-PEGCC Nov 12"); Minneapolis Grain Exchange, Inc. on November 13, 2015.



statements, another commented that the requirement to submit an application to the Commission and await its approval would be unworkable in practice and not provide any apparent regulatory benefit, and a third commented that aggregation relief for majority-owned affiliates was necessary to avoid “serious regulatory costs and consequences.”<sup>44</sup>

Three commenters, each a public policy organization, opposed the modifications described in the Supplemental Notice, saying the modifications would impermissibly weaken the aggregation regime by allowing entities with majority ownership not only to qualify for disaggregation, but also to do so through a simple, immediately effective filing. One commenter said that to allow this would be fundamentally at odds with the statutory mandate of limiting speculation and the requirement of aggregation based on indirect control of an owned entity, because the proposal in the Supplemental Notice would effectively remove the distinction between minority and majority ownership by implementing a presumption that ownership does not entail control over the owned entity’s trading activity.<sup>45</sup> This commenter believes the Commission should reinstate a requirement of aggregation of positions whenever an ownership interest in an owned entity exceeds 10 percent.<sup>46</sup> Another commenter asserted that the procedure in the Supplemental Notice may be contrary to the CEA, because it allows an entity other than the Commission (i.e., the entity which files an automatically-effective compliance notice)

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<sup>44</sup> See Supplemental Notice, 80 FR at 58369-70 (describing comments of FIA, the Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce, and MidAmerican Energy Holdings Company).

<sup>45</sup> See Better Markets, Inc. (“Better Markets”) on November 13, 2015 (“CL-Better Markets Nov 13”). The commenter had also commented on the Proposed Rule, saying that allowing disaggregation of majority-owned subsidiaries would ignore the clear language of CEA section 4a(a)(1). See Supplemental Notice, 80 FR at 58369 (describing comment of Better Markets).

<sup>46</sup> See CL-Better Markets Nov 13.

to make the determination of whether aggregation is required.<sup>47</sup> The third commenter in this group also maintained that relief from the aggregation requirement should not be available to an owner of more than 10 percent of a subsidiary, because “allowing [position] disaggregation of majority-owned subsidiaries would violate the clear language” of CEA section 4a(a)(1) and would allow the owner of such subsidiaries to circumvent position limits through the creation of multiple subsidiaries.<sup>48</sup>

One commenter opposed to the approach in the Supplemental Notice argued that it would lead to inconsistent results because it calls for a case-by-case, discretionary assessment of compliance with standards that test separation of trading activity, instead of an easy to understand, bright-line test premised on ownership percentage. This commenter feared that entities subject to this discretionary standard would be able to attack the Commission’s efforts to enforce the aggregation requirement as arbitrary and capricious.<sup>49</sup> Therefore, the Commission would have to be vigilant in enforcing regulations requiring aggregation by unaffiliated individuals acting pursuant to an implied agreement.<sup>50</sup> For example, this commenter asserted that unaffiliated investment vehicles could serve as a conduit for the trading strategies of a sponsor that holds no equity interest in the investment vehicle, the trading decisions of which are nominally

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<sup>47</sup> See Occupy the SEC on November 13, 2015 (“CL-Occupy the SEC Nov 13”). This commenter warned that challenges to the Commission’s handling of large amounts of data could likely allow many companies that should have their positions aggregated to evade that restriction. See *id.* The commenter had also commented on the Proposed Rule, saying that no relief from aggregation should be allowed for owners of more than 50 percent of an owned entity because in this case the two firms are “largely interconnected.” See Supplemental Notice, 80 FR at 58369 (describing comment of Occupy the SEC).

<sup>48</sup> See Institute for Agriculture and Trade Policy (“IATP”) on November 13, 2015 (“CL-IATP Nov 13”).

<sup>49</sup> See CL-Occupy the SEC Nov 13.

<sup>50</sup> See *id.* Along similar lines, another commenter said that the increasing ease of electronic interoffice communication could allow for circumvention of the aggregation requirements. See CL-IATP Nov 13.

outsourced to an unaffiliated investment advisor.<sup>51</sup> The commenter believes that aggregation must be applied in such a case, despite the apparent absence of an ownership relationship between the sponsor and the investment vehicle.<sup>52</sup>

b. Comments Suggesting Additional Relief from the Aggregation Requirement, or a Different Ownership Threshold

Several commenters believed that the proposal should be modified to provide relief from the aggregation requirement in additional situations. For instance, one commenter said that the Commission should provide an exemption from aggregation for transitory ownership or equity interests in an owned-entity, such as those acquired through foreclosure or a similar credit event.<sup>53</sup> Other commenters said the Commission should establish a process for entities that do not squarely meet the criteria for disaggregation relief in proposed rule 150.4(b)(2), allowing them to seek disaggregation relief based upon particular facts and circumstances demonstrating that the owner does not control or have shared knowledge of the owned entity's trading activities.<sup>54</sup> Other commenters asked for clarification of whether relief from aggregation on the basis of ownership is available to general partners or other persons holding interests in various forms of partnerships.<sup>55</sup>

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<sup>51</sup> See CL-Occupy the SEC Nov 13.

<sup>52</sup> See *id.*

<sup>53</sup> See FIA on February 6, 2014 ("CL-FIA Feb 6") and CL-FIA Nov 13.

<sup>54</sup> See CL-COPE Nov 13. See also CL-Morgan Lewis Nov 13 (exemption from aggregation requirement should be a non-exclusive safe harbor, not excluding the possibility of relief for owners and owned entities that do not satisfy every criteria; delegate authority under 4a(a)(7) to staffs of the Commission, DCMs and SEFs to provide disaggregation relief to such firms on a case-by-case basis); CL-EPISA Nov 13 (10 percent ownership should invoke a rebuttable presumption that can be overcome by making the required notice filing in good faith).

<sup>55</sup> See Managed Funds Association on February 7, 2014 ("CL-MFA Feb 7"); CL-Energy Transfer Nov 13.

Although commenters generally supported the modifications made in the Supplemental Notice, and in particular the removal of the distinction between ownership interests of less than 50 percent and more than 50 percent, several commenters maintained that the Commission should not apply a threshold of 10 percent for the requirement of a notice filing in order to claim disaggregation relief.

Some commenters said that the Commission should apply a higher threshold below which a claim for disaggregation relief would not be required. Three commenters advocated for the threshold to be moved to 25 percent.<sup>56</sup> Other commenters said the threshold should be 50 percent, claiming that minority ownership generally does not permit control over operational aspects of the owned entity's activities, including trading strategy and decisions.<sup>57</sup> One commenter supporting a higher threshold remarked that maintaining the 10 percent threshold will trigger "false positives" requiring owners with no actual control over an owned-entity's trading activity to file a notice with the Commission, which will impose significant costs on market participants to prepare and file a notice, and on the Commission which will have to review and administer all of the filed notices.<sup>58</sup> In contrast, this commenter said, a higher threshold would allow the Commission to focus its surveillance resources on entities where there is a greater likelihood of commonly controlled trading activity.<sup>59</sup>

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<sup>56</sup> See CL-ISDA Nov 12; CL-MFA Feb 7; CL-AIMA Feb 10.

<sup>57</sup> See CSC Sugar, LLC on February 10, 2014; CL-IECA Nov 13; CL-PEGCC Nov 12; CL-OTPP Nov 13; CL-FIA Nov 13; CL-NGSA Nov 13.

<sup>58</sup> See CL-FIA Nov 13.

<sup>59</sup> See *id.*

c. Comments Asserting that Aggregation Should Not Be Based on Ownership Alone

Other commenters said that there should be no ownership percentage threshold for disaggregation relief, but rather aggregation should be required solely on the basis of actual control of trading.<sup>60</sup> Certain of these commenters asserted that the CEA requires that a person control the owned entity's accounts in order to require aggregation.<sup>61</sup> Other commenters focused on the operational challenges of aggregation based on ownership, and asserted that limiting the aggregation requirement to cases where there is control would more closely match how affiliated companies operate.<sup>62</sup> One DCM argued that aggregation should be required only when there is both ownership and control of the owned entity, and said that it (i.e., the DCM) does not automatically aggregate positions of companies with 100 percent common ownership, so long as the commonly-owned companies operate independently from one another in terms of decision-making and control of trading decisions.<sup>63</sup>

A commenter representing investment managers maintained that the Commission should not require passive investors in owned entities to aggregate the owned entities' positions when the passive investors do not have actual control over the owned entities' trading.<sup>64</sup> This commenter focused on the requirement to file a notice to claim relief

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<sup>60</sup> See Wilmar International Limited on November 13, 2015 ("CL-Wilmar Nov 13"); U.S. Chamber of Commerce's Center for Capital Markets Competitiveness on February 10, 2014 ("CL-Chamber Feb 10"); National Council of Farmers Cooperatives on August 4, 2014 ("CL-NCFC Aug 4"); Commodity Markets Council on January 22, 2015 ("CL-CMC Jan 22"); Natural Gas Supply Association on February 10, 2014 ("CL-NGSA Feb 10"); Archer Daniels Midland Company on January 20, 2015; The Andersons, Inc. on January 15, 2014. See also CL-ECOM Nov 13 (Commission should apply a facts and circumstances approach that permits disaggregation conditioned on independence of control of trading decisions).

<sup>61</sup> See CL-Wilmar Nov 13 and CL-Chamber Feb 10.

<sup>62</sup> See CL-NCFC Aug 4; CL-CMC Jan 22; CL-NGSA Feb 10.

<sup>63</sup> See ICE Futures US, Inc. on February 10, 2014 ("CL-ICE Feb 10"). See also CL-NGSA Feb 10 (arguing that aggregation should require findings of both ownership and control)

<sup>64</sup> See CL-SIFMA AMG Nov 13.

from aggregation (which it said would be burdensome for entities that manage a large number of investment funds), and suggested instead that the criteria in proposed rule 105.4(b)(2)(i) be treated as a non-exclusive safe harbor, with other relief from aggregation being available in various circumstances.<sup>65</sup> The commenter asserted that the CEA requires aggregation only when there is actual control of the owned entity's derivatives trading, which the Commission has traditionally interpreted not to follow necessarily from mere corporate control of the owned entity.<sup>66</sup>

A holding company for a number of DCMs commented that the Commission did not identify any basis or justification for the various features of the Proposed Rule.<sup>67</sup> This commenter contended that features of the Proposed Rule (regarding the owned entity aggregation rules, the IAC exemption, and the “substantially identical trading strategies” rule) are not in accordance with law, are arbitrary and capricious, are an unexplained departure from the Commission’s administrative precedent, and are not more permissive than existing aggregation standards.<sup>68</sup> Two other commenters were also of the opinion that the Proposed Rule was not supported by the Commission’s

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<sup>65</sup> See SIFMA AMG on August 1, 2014 (discussing practical difficulties such as monitoring the equity ownership held by managed funds/accounts, and monitoring the commodity derivatives positions held by the operating companies in which managed funds/accounts hold equity ownership). See also CL-SIFMA AMG Nov 13; CL-Wilmar Nov 13.

<sup>66</sup> See SIFMA AMG on February 10, 2014 (“CL-SIFMA AMG Feb 10”) (referring to requirement to file reports on Form 40 and asserting that the Commission’s pre-2011 rulemakings required aggregation on the basis of direct ownership in accounts, not on the basis of ownership interests in third parties who, in turn, owned positions in derivatives trading accounts).

<sup>67</sup> See CME Group, Inc. on February 10, 2014 (“CL-CME Feb 10”).

<sup>68</sup> CL-CME Feb 10 (opining that under Commission precedent, a 10 percent or more ownership or equity interest in an account is an indicia of trading control, but precedent does not support a requirement for aggregation based on a 10 percent or more ownership or equity interest in an entity). This commenter reasoned that the Commission’s use of the term “account” has never referred to an owned entity that itself has accounts, that the 1979 Aggregation Policy suggests the Commission contemplated a definition of “account” that means no more than a personally owned futures trading account, and that the 1999 Amendments to the aggregation rules were focused on directly owned accounts. Id.

administrative precedent.<sup>69</sup> Commenters asserted that section 4a(a)(1) of the CEA provides no basis for requiring aggregation of positions held by another person in the absence of control of such other person.<sup>70</sup> One of these commenters also stated that existing regulation 150.4(b) generally exempts a commodity pool's participants with an ownership interest of 10 percent or greater from aggregating the positions held by the pool.<sup>71</sup> Finally, commenters contended that two of the Commission's enforcement cases indicate that the Commission has viewed aggregation as being required only where there is common trading control.<sup>72</sup>

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<sup>69</sup> One of these commenters contended that under the Commission's precedents "[l]egal affiliation [between companies] has been an indicium but not necessarily sufficient for position aggregation." See Commodity Markets Council on Feb 10, 2014 ("CL-CMC Feb 10").

The other commenter asserted that the Commission has never specifically required aggregation solely on the basis of ownership of another legal person. CL-NGSA Feb 10. To support its view, this commenter said that the 1979 Aggregation Policy and the 1999 Amendments apply to only trading accounts that are directly or personally held or controlled by an individual or legal entity, the Commission's large trader rules require aggregation of multiple accounts held by a particular person, not the accounts of a person and its owned entities, and existing regulation 18.04(b) distinguishes between owners of the "reporting trader" and the owners of the "accounts of the reporting trader." Id.

<sup>70</sup> See CL-CME Feb 10; CL-NGSA Feb 10. One commenter asserted that the Commission's citation of prior rules requiring aggregation of owned entity positions at a 10 percent ownership level was not a sufficient consideration of the statutorily required factors. CL-CME Feb 10.

Another commenter contended that "CEA section 4a(a)(1) only allows the Commission to require the aggregation of positions on ownership alone when those positions are directly owned by a person. The positions of another person are only to be aggregated when the person has direct or indirect control over the trading of another person." CL-NGSA Feb 10.

<sup>71</sup> See CL-CME Feb 10 (noting that the Commission's proposal to amend regulation 150.3 to include the separately incorporated affiliates of CPOs, CTAs or FCMs as eligible entities for the exemption relief of regulation 150.3 (63 Fed. Reg. 38525 at 38532 n. 27 (July 17, 1998)) states: "Affiliated companies are generally understood to include one company that owns, or is owned by, another or companies that share a common owner"). This commenter also asserted that the term "principals" under existing regulation 3.1(a)(2)(ii) include entities that have a direct ownership interest that is 10 percent or greater in a lower tier entity, such as the parent of a wholly-owned subsidiary. Id. From these two provisions, the commenter concluded that the corporate parent of a wholly-owned CPO would be affiliated with, and a principal of, its wholly-owned subsidiary.

<sup>72</sup> See CL-CME Feb 10, citing *In the Matter of Vitol Inc. et al.*, Docket No. 10-17 (Sept. 14, 2010), available at <http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfvitolorder09142010.pdf> and *In the Matter of Citigroup Inc. et al.*, Docket No. 12-34 (Sept. 21, 2012), available at <http://www.cftc.gov/ucm/groups/public/@lrenforcementactions/documents/legalpleading/enfcitigroupcgmlorder092112.pdf>. Another commenter contended that *In the Matter of Vitol* was based on facts that would be relevant only if common trading control was necessary for aggregating the positions of affiliated companies. See CL-NGSA Feb 10.

d. Other Comments Related to Aggregation

The Commission received conflicting comments about passive index-tracking commodity pools. One commenter asserted that the operators of such pools do not have discretion to react to market movements and, thus, do not “control” trading in the usual meaning of that word, so the positions of such pools should not be aggregated with other pools operated by the same operator.<sup>73</sup> Another commenter said the Commission should mandate aggregation of all positions of a group or class of traders such as operators of passive index-tracking commodity pools, because the Commission should focus on excessive concentration of positions and potential market manipulation.<sup>74</sup> This commenter noted that the CEA includes language extending the CFTC’s aggregation powers to cover “any group or class of traders.”<sup>75</sup>

Two commenters suggested that the rule provide an explicit exemption from aggregation for pension plans, because the proposed rule creates a complicated and potentially unavailable route to relief to entities that are required to operate only in the best interests of plan beneficiaries and thus cannot be used to further the interests of the pension plan’s sponsor.<sup>76</sup>

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<sup>73</sup> See DB Commodity Services LLC (a wholly-owned, indirect subsidiary of Deutsche Bank AG) on February 10, 2014 (“CL-DBCS Feb 10”).

<sup>74</sup> See CL-Better Markets Nov 13.

<sup>75</sup> See *id.* (citing CEA section 4a(a)(1)).

<sup>76</sup> See Commercial Energy Working Group on February 10, 2014 (“CL-Working Group Feb 10”); CL-Working Group Nov 13; CL-CMC Nov 13; CL-CMC Feb 10. One of these commenters asserted that a common structure for U.S. pension plans is to have employees of the sponsor serve as members of the investment committee of the plan, which is a separate legal entity from and unaffiliated with the sponsor. The commenter claimed that these employees typically have an investment background and may serve in trading-related roles for the plan sponsor, and may have knowledge of both the plan and the sponsor’s trading activity, which may prevent the plan and the sponsor from utilizing the proposed exemption from aggregation for pension plans. Aggregation would, the commenter said, put the fiduciaries of these plans in the position of having to account for the trading strategies of the sponsor, which may not be in the best interests of plan participants. See CL-Working Group Nov 13; CL-Working Group Feb 10.



### 3. Final Rule

The Commission is adopting rule 150.4(a)(1) as it was stated in the Proposed Rule and reiterated in the Supplemental Notice. This rule sets forth the requirements to aggregate positions on the basis of ownership or control, or when two or more persons act together under an express or implied agreement. The Commission is also adopting rule 150.4(b)(2) substantially as it was proposed in the Supplemental Notice (with certain modifications discussed below) but, as stated in the Supplemental Notice, it is not adopting proposed rule 150.4(b)(3).<sup>77</sup> The Commission is also adopting the conforming change in rule 150.4(b)(6) from the Supplemental Notice, to delete a cap of 50 percent on the ownership or equity interest for broker-dealers to disaggregate.<sup>78</sup> The Commission is persuaded by the commenters that rule 150.4(b)(2) should apply to all persons with an ownership or equity interest in an owned entity of 10 percent or greater (i.e., an interest of up to and including 100 percent) in the same manner.

#### a. Ownership Threshold for Aggregation

The Commission continues to believe that, as stated in the Supplemental Notice, the overall purpose of the position limits regime (to diminish the burden of excessive speculation which may cause unwarranted changes in commodity prices) would be better served by focusing the aggregation requirement on situations where the owner is, in view

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<sup>77</sup> Because the Commission is not adopting proposed rule 150.4(b)(3), paragraphs (b)(4) to (b)(9) of proposed rule 150.4 are renumbered in the final rule as paragraphs (b)(3) to (b)(8), respectively. Also, as proposed in the Supplemental Notice, the Commission is not adopting proposed rule 150.4(e)(1)(i) which contained a delegation of authority referencing proposed rule 150.4(b)(3), and the final rule also reflects the deletion of a cross-reference to proposed rule 150.4(b)(3)(vii) in rule 150.4(c)(1). See Supplemental Notice, 80 FR at 58371.

<sup>78</sup> See id. Final rule 150.4(b)(6) (proposed as rule (b)(7)) is discussed more fully in section II.0, below.

of the circumstances, actually able to control the trading of the owned entity.<sup>79</sup> The Commission reasons that the ability to cause unwarranted changes in the price of a commodity derivatives contract would result from the owner's control of the owned entity's trading activity.

Rule 150.4(b)(2) will continue the Commission's longstanding rule that persons with either an ownership or an equity interest in an account or position of less than 10 percent need not aggregate such positions solely on the basis of the ownership criteria, and persons with a 10 percent or greater ownership interest will generally be required to aggregate the account or position.<sup>80</sup> The Commission has found, over the decades that the 10 percent threshold has been in effect, that this is an appropriate level at which aggregation should be required, and no change to this threshold was proposed.

The Commission considered the comments that suggested different ownership thresholds (e.g., 25 percent or 50 percent) for the aggregation requirement. In contrast to the satisfactory experience with the 10 percent threshold, the Commission believes that none of the commenters presented a compelling analysis to justify a different threshold. That is, while it is undoubtedly true that application of different ownership thresholds would result in differences in which persons would be required to aggregate or seek exemptions from aggregation, the commenters did not provide a persuasive explanation of how application of a 25 percent or 50 percent ownership threshold would more

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<sup>79</sup> The Commission notes in this regard that there may have been significant burdens in meeting the requirements of proposed rule 150.4(b)(3) even where there is no control of the trading of the owned entity, as was suggested by the Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce, SIFMA AMG and other commenters on the Proposed Rule. See Supplemental Notice, 80 FR at 58371.

<sup>80</sup> For purposes of aggregation, the Commission continues to believe, as stated in the Proposed Rule, that contingent ownership rights, such as an equity call option, would not constitute an ownership or equity interest. See Proposed Rule at 68958.

appropriately further the purposes of the position limit regime than the 10 percent threshold which has been applied to date.

For example, one commenter posited that maintaining the 10 percent threshold would require owners to file unnecessary notices seeking exemptions from aggregation, imposing a burden on both market participants and the Commission.<sup>81</sup> However, the Commission believes that preparation of the required notices (and the Commission's review of them) will not impose undue burdens, and the notices will be helpful to the Commission in monitoring the use of exemptions from aggregation.<sup>82</sup> So while raising the threshold would presumably decrease the number of notices that are filed, it is not clear that the benefit would be significant since the filing burden is minimal; at the same time, however, the amount of information available to the Commission for use in monitoring and enforcement would be reduced, a potential harm. Because of this uncertainty, the Commission cannot conclude that a 25 percent, 50 percent or other threshold would be significantly better than the 10 percent threshold which has been satisfactorily applied to date, and the Commission has determined to leave the 10 percent threshold in place.

After considering the comments on the proposed procedure in rule 150.4(b)(2) for a notice filing to permit a person with an ownership or an equity interest in an owned entity of 10 percent or greater to disaggregate the positions of the owned entity in specified circumstances, the Commission has determined to adopt this proposal.<sup>83</sup> The

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<sup>81</sup> See CL-FIA Nov 13.

<sup>82</sup> As discussed below, the Commission has instructed its staff to conduct ongoing surveillance and monitoring of disaggregation filings and related information for red flags.

<sup>83</sup> Under the rule adopted here, and in a manner similar to current regulation, if a person qualifies for disaggregation relief, the person would nonetheless have to aggregate those same accounts or positions

notice filing must demonstrate compliance with the conditions set forth in rule 150.4(b)(2), which are discussed below. Similar to other exemptions from aggregation, the notice filing will be effective upon submission to the Commission, but the Commission is able to subsequently call for additional information, and to amend, terminate or otherwise modify the person's aggregation exemption for failure to comply with the provisions of rule 150.4(b)(2). Further, the person is obligated to amend the notice filing in the event of a material change to the circumstances described in the filing.<sup>84</sup>

The Commission notes that commenters raised valid concerns about permitting disaggregation following a notice filing that is effective upon submission.<sup>85</sup> The Commission has instructed its staff to conduct ongoing surveillance and monitoring of disaggregation filings and related information for red flags which could include, but would not be limited to, the creation of multiple subsidiaries, filings that are only superficially complete, and patterns of trading that suggest coordination after a filing has been made. The Commission is sensitive to the potential for circumvention of position limits through the use of multiple subsidiaries, but it continues to believe, as stated in the Supplemental Notice, that the criteria in rule 150.4(b)(2)(i), which must be satisfied in order to disaggregate, will appropriately indicate whether an owner has control of or knowledge of the trading activity of the owned entity.<sup>86</sup> The disaggregation criteria require that the two entities not have knowledge of each other's trading and, moreover,

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covered by the relief if they are held in accounts with substantially identical trading strategies. See rule 150.4(a)(2). The exemptions in rule 150.4 are set forth as alternatives, so that, for example, the applicability of the exemption in paragraph (b)(2) would not affect the applicability of a separate exemption from aggregation (e.g., the independent account controller exemption in paragraph (b)(4)).

<sup>84</sup> See rule 150.4(c), discussed in section II.0., below.

<sup>85</sup> See CL-Better Markets Nov 13; CL-Occupy the SEC Nov 13; CL-IATP Nov 13.

<sup>86</sup> See Supplemental Notice, 80 FR at 58371.

have and enforce written procedures to preclude such knowledge.<sup>87</sup> And, in fact, as noted in the Proposed Rule, the Commission has applied, and expects to continue to apply, certain of the same conditions in connection with the IAC exemption to ensure independence of trading between an eligible entity and an affiliated independent account controller.<sup>88</sup>

If the disaggregation criteria are satisfied, the Commission believes that disaggregation may be permitted without weakening the aggregation regime, even if the owner has a greater than 50 percent ownership or equity interest in the owned entity. Even in the case of majority ownership, if the disaggregation criteria are satisfied, the ability of an owner and the owned entity to act together to engage in excessive speculation or to cause unwarranted price changes should not differ significantly from that of two separate individuals. The Commission reaches this conclusion based in part on commenters' descriptions of relevant corporate structures. For example, one commenter described instances where an entity has a 100 percent ownership interest in another entity, yet does not control day-to-day business activities of the owned entity.<sup>89</sup> In this situation the owned entity would not have knowledge of the activities of other entities owned by the same owner, nor would it raise the heightened concerns, triggered when one entity both owns and controls trading of another entity, that the owner would necessarily act in a coordinated manner with other owned entities.

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<sup>87</sup> See rule 150.4(b)(2)(i), discussed in section II.0., below.

<sup>88</sup> See Proposed Rule, 78 FR at 68961, referring to existing regulation 150.3(a)(4) (to be replaced by rule 150.4(b)(4)). Such conditions have been useful in ensuring that trading is not coordinated through the development of similar trading systems, and that procedures are in place to prevent the sharing of trading decisions between entities.

<sup>89</sup> See MidAmerican Energy Holdings Company on February 7, 2014 ("CL-MidAmerican Feb 7").

As explained in the Supplemental Notice, the Commission believes it would be inappropriate to disallow the possibility of a notice filing to disaggregate the positions of majority-owned subsidiaries, because without this possibility of relief, corporate groups may be required to establish procedures to monitor and coordinate trading activities across disparate owned entities, which could have unpredictable consequences.<sup>90</sup> The Commission recognizes that these consequences could include not only the cost of establishing these procedures, but also the impairment of corporate structures which were established to ensure that the various owned entities engage in business independently. This independence may serve important purposes which could be lost if the aggregation requirement were imposed too widely. The Commission does not intend that the aggregation requirement interfere with existing corporate structures and procedures adopted to ensure the independence of owned entities.<sup>91</sup>

Adoption of rule 150.4(b)(2) is in accordance with the Commission's authority under CEA section 4a(a)(7) to provide relief from the position limits regime. The notice filing requirement in the rule will appropriately implement the CEA. The 10 percent threshold historically applied by the Commission continues to have importance, because it demarcates the level at which the notice filing and the procedures underlying the notice are required. Relief under rule 150.4(b)(2) will not be automatic, but rather will require a

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<sup>90</sup> See Supplemental Notice, 80 FR at 58369-70.

<sup>91</sup> The Commission noted in the Supplemental Notice that the disaggregation criteria in rule 150.4(b)(2)(i) should be relatively familiar to corporate groups, because they are in line with prudent corporate practices that are maintained for longstanding, well-accepted reasons. See *id.* The Commission also notes that since the aggregation rules may be a precedent for aggregation rules enforced by DCMs and SEFs, it is even more important that the aggregation rules set out, to the extent feasible, "bright line" rules that are capable of easy application by a wide variety of market participants while not being susceptible to circumvention. See Proposed Rule, 78 FR at 68596, n. 103. The Commission believes that by implementing an approach to aggregation that is in keeping with longstanding corporate practices, rule 150.4 (b)(2) promotes the goal of setting out "bright line" rules that are relatively easy to apply while not being susceptible to circumvention.

certification (provided in the notice under rule 150.4(c)) that procedures to ensure independence are in place.

Furthermore, as the Commission noted in the Supplemental Notice, satisfaction of the criteria in rule 150.4(b)(2) would not foreclose the possibility that positions of owners and owned entities would have to be aggregated.<sup>92</sup> For example, aggregation is and would continue to be required under rule 150.4(a)(1) if two or more persons act pursuant to an express or implied agreement; and this aggregation requirement would apply whether the two or more persons are an owner and owned entity(ies) that meet the conditions in proposed rule 150.4(b)(2), or are unaffiliated individuals.

b. Ownership is a Valid Basis for Aggregation

Regarding those commenters who said that ownership of an entity should not be a basis for aggregation of that entity's positions, the Commission continues to interpret section 4a(a)(1) of the CEA, as stated in the Proposed Rule and reiterated in the Supplemental Notice, to provide for the general aggregation standard with regard to position limits, and specifically supports aggregation on the basis of ownership, because it provides that in determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person; and further, such limits upon positions and trading shall apply to positions held by, and trading done by, two or more persons acting pursuant to an expressed or implied agreement or

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<sup>92</sup> See Supplemental Notice, 80 FR at 58371.

understanding, the same as if the positions were held by, or the trading were done by, a single person.<sup>93</sup>

The Commission explained in the Proposed Rule that this interpretation is supported by Congressional direction and Commission precedent from as early as 1957 and continued through 1999.<sup>94</sup>

For example, in 1968, Congress amended the aggregation standard in CEA section 4a to include positions “held by” one trader for another,<sup>95</sup> supporting the view that an owner should aggregate the positions held by an owned entity (because the owned entity is holding the positions for the owner). During the Commission’s 1986 reauthorization, witnesses at Congressional hearings suggested that “aggregation of positions based on ownership without actual control unnecessarily restricts a trader's use of the futures and options markets,” but the Congressional committee did not recommend any changes to the statute based on these suggestions.<sup>96</sup>

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<sup>93</sup> 7 U.S.C. 6a(a)(1), cited in Proposed Rule, 78 FR at 68956, and Supplemental Notice, 80 FR 58366.

<sup>94</sup> See Proposed Rule, 78 FR at 68956.

<sup>95</sup> See S. Rep. No. 947, 90<sup>th</sup> Cong., 2 Sess. 5 (1968) regarding the CEA Amendments of 1968, Pub. L. 90-258, 82 Stat. 26 (1968). This Senate Report provides:

Certain longstanding administrative interpretations would be incorporated in the act. As an example, the present act authorizes the Commodity Exchange Commission to fix limits on the amount of speculative “trading” that may be done. The Commission has construed this to mean that it has the authority to set limits on the amount of buying or selling that may be done and on the size of positions that may be held. All of the Commission's speculative limit orders, dating back to 1938, have been based upon this interpretation. The bill would clarify the act in this regard....

Section 2 of the bill amends section 4a(1) of the act to show clearly the authority to impose limits on “positions which may be held.” It further provides that trading done and positions held by a person controlled by another shall be considered as done or held by such other; and that trading done or positions held by two or more persons acting pursuant to an express or implied understanding shall be treated as if done or held by a single person.

<sup>96</sup> See H.R. Rep. No. 624, 99<sup>th</sup> Cong., 2d Sess. (1986) at page 43. The Report noted that:

During the subcommittee hearings on reauthorization, several witnesses expressed dissatisfaction with the manner in which certain market positions are aggregated for purposes of determining compliance with speculative limits fixed under Section 4a of the Act. The witnesses suggested that, in some instances, aggregation of positions based on ownership without actual control unnecessarily restricts a trader's use of the futures and options markets. In this connection, concern was expressed about the application of speculative limits to the market positions of certain commodity pools and pension funds using multiple



In 1988, the Commission reviewed petitions by the Managed Futures Trade Association and the Chicago Board of Trade which argued against aggregation based only on ownership.<sup>97</sup> In response to the petition, however, the Commission stated that:

Both ownership and control have long been included as the appropriate aggregation criteria in the Act and Commission regulations. Generally, inclusion of both criteria has resulted in a bright-line test for aggregating positions. And as noted above, although the factual circumstances surrounding the control of accounts and positions may vary, ownership generally is clear.

... In the absence of an ownership criterion in the aggregation standard, each potential speculative position limit violation would have to be analyzed with regard to the individual circumstances surrounding the degree of trading control of the positions in question. This would greatly increase uncertainty.<sup>98</sup>

Even earlier administrative determinations, as well as regulations of the Commodity Exchange Authority, announced standards that included control of trading and financial interests in positions. As early as 1957, the Commission's predecessor issued determinations requiring that accounts in which a person has a financial interest be included in aggregation.<sup>99</sup> In addition, the definition of "proprietary account" in

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trading managers who trade independently of each other. The Committee does not take a position on the merits of the claims of the witnesses. Id.

<sup>97</sup> The Managed Futures Trade Association petition requested that the Commission amend the aggregation standard for exchange-set speculative position limits in regulation 1.61(g) (now regulation 150.5(g)), by adding a proviso to exclude the separate accounts of a commodity pool where trading in those accounts is directed by unaffiliated CTAs acting independently. See Exemption From Speculative Position Limits for Positions Which Have a Common Owner but Which Are Independently Controlled; Proposed Rule, 53 FR 13290, 13291-92 (Apr. 22, 1988). The petition argued the ownership standard, as applied to "multiple-advisor commodity pools, is unfair and unrealistic" because while the commodity pool may own the positions in the separate accounts, the CPO does not control trading of those positions (the unaffiliated commodity trading advisor ("CTA") does) and therefore the pool's ownership of the positions will not result in unwarranted price fluctuations. See id. at 13292.

The petition from the Chicago Board of Trade (which is now a part of CME Group, Inc.) sought to revise the aggregation standard so as not to require aggregation based solely on ownership without control. See id.

<sup>98</sup> See id. In response to the petitions, however, the Commission proposed the IAC exemption, which provides "an additional exemption from speculative position limits for positions of commodity pools which are traded in separate accounts by unaffiliated account controllers acting independently." Id.

<sup>99</sup> See Administrative Determination 163 (Aug. 7, 1957) ("[I]n the application of speculative limits, accounts in which the firm has a financial interest must be combined with any trading of the firm itself or any other accounts in which it in fact exercises control."). In addition, the Commission's predecessor, and later the Commission, provided the aggregation standards for purposes of position limits in the large trader

regulation 1.3(y), which has been in effect for decades, includes any account in which there is 10 percent ownership.<sup>100</sup>

In light of the language in section 4a, its legislative history, subsequent regulatory developments, and the Commission's historical practices in this regard, the Commission continues to interpret section 4a to require aggregation on the basis of either ownership or control of an entity. The Commission also believes that aggregation of positions across accounts based upon ownership is a necessary part of the Commission's position limit regime.<sup>101</sup>

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reporting rules. See Superseding of Certain Regulations, 26 FR 2968 (Apr. 7, 1961). In 1961, then regulation 18.01(a) ("Multiple Accounts") stated that if any trader holds or has a financial interest in or controls more than one account, whether carried with the same or with different futures commission merchants or foreign brokers, all such accounts shall be considered as a single account for the purpose of determining whether such trader has a reportable position and for the purpose of reporting. 17 CFR 18.01 (1961).

In the 1979 Aggregation Policy, the Commission discussed regulation 18.01, stating:

*Financial Interest in Accounts.* Consistent with the underlying rationale of aggregation, existing reporting Rule 18.10(a) (sic) basically provides that if a trader holds or has a financial interest in more than one account, all accounts are considered as a single account for reporting purposes. Several inquiries have been received regarding whether a nominal (sic) financial interest in an account requires the trader to aggregate. Traditionally, the Commission's predecessor and its staff have expressed the view that except for the financial interest of a limited partner or shareholder (other than the commodity pool operator) in a commodity pool, a financial interest of 10 percent or more requires aggregation. The Commission has determined to codify this interpretation at this time and has amended Rule 18.01 to provide in part that, "For purposes of this Part, except for the interest of a limited partner or shareholder (other than the commodity pool operator) in a commodity pool, the term 'financial interest' shall mean an interest of 10 percent or more in ownership or equity of an account."

Thus, a financial interest at or above this level will constitute the trader as an account owner for aggregation purposes.

1979 Aggregation Policy, 44 FR at 33843.

The provisions concerning aggregation for position limits generally remained part of the Commission's large trader reporting regime until 1999 when the Commission incorporated the aggregation provisions into existing regulation 150.4 with the existing position limit provisions in part 150. See 1999 Amendments. The Commission's part 151 rulemaking also incorporated the aggregation provisions in vacated regulation 151.7 along with the remaining position limit provisions in part 151. See 76 FR 71626, Nov. 18, 2011.

<sup>100</sup> 17 CFR 1.3(y). This provision has been in existing regulation 1.3(y)(1)(iv) since at least 1976, which the Commission adopted from regulations of its predecessor, with "for the most part, procedural, housekeeping-type modifications, conforming the regulations to the recently enacted CFTCA." See 41 FR 3192, 3195 (January 21, 1976).

<sup>101</sup> See 1999 Amendments, 64 FR at 24044 ("[T]he Commission...interprets the 'held or controlled' criteria as applying separately to ownership of positions or to control of trading decisions."). See also, Exemptions from Speculative Position Limits for Positions which have a Common Owner but which are Independently Controlled and for Certain Spread Positions, 53 FR 13290, 13292 (Apr. 22, 1988). In response to two

Moreover, an ownership standard establishes a bright-line test that provides certainty to market participants and the Commission.<sup>102</sup> Without aggregation on the basis of ownership, the Commission would have to apply a control test in all cases, which would pose significant administrative challenges to individually assess control across all market participants. Further, the Commission considers that if the statute were read to require aggregation based only on control, market participants may be able to use an ownership interest to directly or indirectly influence the account or position and thereby circumvent the aggregation requirement.

In the Supplemental Notice, the Commission responded to commenters' assertions that the Proposed Rule was not in accordance with the Commission's statutory authority or precedents.<sup>103</sup> In brief, the Commission explained that the aggregation requirement in CEA section 4a is not phrased in terms of whether the owner holds an interest in a trading account.<sup>104</sup> The Commission also explained why its enforcement history does not contradict the Commission's traditional view of aggregation of owned

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separate petitions, the Commission proposed the independent account controller exemption from speculative position limits, but declined to remove the ownership standard from its aggregation policy. The 1999 Amendments' reference to the Commission's large-trader reporting system, 64 FR at 24043, is not related to the aggregation rules for the position limits regime. Rather, the 1999 Amendments included an explanation of situations in which reporting could be required based on both control and ownership. 1999 Amendments, 64 FR at 24043 and n. 26. (the "routine large trader reporting system is set up so that it does not double count positions which may be controlled by one and traded for the beneficial ownership of another. In such circumstances, although the routine reporting system will aggregate the positions reported by FCMs using only the control criterion, the staff may determine that certain accounts or positions should also be aggregated using the ownership criterion or may by special call receive reports directly from a trader.")

<sup>102</sup> See footnote 91, above.

<sup>103</sup> See Supplemental Notice, 80 FR at 58373.

<sup>104</sup> In fact, the word "account" does not even appear in the statute. As noted above, section 4a(a)(1) of the CEA provides that in determining whether any person has exceeded such limits, the positions held and trading done by any persons directly or indirectly controlled by such person shall be included with the positions held and trading done by such person. 7 U.S.C. 6a(a)(1).

entity positions as being required on the basis of either control or ownership.<sup>105</sup> The relevant commenters did not discuss these points in the comments they submitted on the Supplemental Notice,<sup>106</sup> and the Commission considers that the discussion of these matters in the Supplemental Notice explains how the final rule is in accordance with law and the Commission's precedents.<sup>107</sup>

c. Other Considerations Relevant to the Proposed Rule

The Commission does not believe, as suggested by some commenters, that the aggregation requirement in rule 150.4(a)(1) would lead to significantly more information sharing or significantly increased levels of coordinated speculative trading by the entities subject to aggregation. Among other things, the position limits would affect the trading of only entities that hold positions in excess of the limits, which the Commission expects to be relatively small in comparison to all entities that are active in the relevant markets.<sup>108</sup> Thus, the Commission continues to believe that the final rule will not result in a significantly increased level of information sharing that would increase coordinated speculative trading. The Commission notes that rule 150.4(b) sets out various aggregation exemptions, lessening the need to share information regarding speculative trading to ensure compliance with position limits.

The Commission has also considered that relief from any rule requiring the aggregation of positions held by separate entities is only necessary where the entities would be below the relevant limits on an individual basis, but above a limit when

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<sup>105</sup> See Supplemental Notice, 80 FR at 58373.

<sup>106</sup> See CL-CME Nov 13 and CL-NGSA Nov 13.

<sup>107</sup> See Supplemental Notice, 80 FR at 58373.

<sup>108</sup> See, e.g., Position Limits for Futures and Swaps, 76 FR 71626, 71668 (Nov. 18, 2011) (describing the number of traders estimated to be subject to position limits).

aggregated. Thus, as the Commission suggested in the Proposed Rule, if a group of affiliated entities can take steps to maintain an aggregate position that does not exceed any limit, then the group will not have to seek disaggregation relief.<sup>109</sup>

In other words, the Commission continues to believe that seeking disaggregation relief is one option for those groups of affiliated entities that may exceed a limit on an aggregate basis but will remain below the relevant limits on an individual basis. Other avenues are also available to corporate groups that seek to remain in compliance with the position limit regime. For example, the affiliated entities may put into place procedures to avoid exceeding the limits on an aggregate basis.<sup>110</sup> One potential approach that could be available to a holding company with multiple subsidiaries would be to assign each subsidiary an internal limit based on a percentage of the level of the position limit. The holding company would allocate no more in aggregate internal limits than the level of the position limit.<sup>111</sup> Further, a breach of an internal limit would provide the holding company with notice that it should consider filing for bona fide hedging exemptions or taking other compliance steps, as applicable.

The Commission also considered whether aggregation of positions is unnecessary because information about ownership and control is available to the Commission through

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<sup>109</sup> See Proposed Rule, 78 FR at 68958.

<sup>110</sup> The procedures adopted by the affiliates may obviate more complex steps such as the implementation of real-time monitoring software to consolidate all derivative activities of the affiliates, especially if the group currently does not have an aggregate position approaching the size of a position limit and has historically not changed position sizes day-over-day by a significant percentage of the position limit.

<sup>111</sup> An even more cautious approach would be for the holding company to limit the overall allocation to the subsidiaries to less than 100 percent of the position limit. For example, a holding company with three subsidiaries may assign each subsidiary an internal limit equal to 30 percent of the level of the federal limit. Thus, the holding company has allocated permission to subsidiaries to hold, in the aggregate, positions equal to up to 90 percent of the level of the relevant position limit. Each subsidiary would simply report at close of business its derivative position to the holding company. The 10 percent cushion provides the holding company with the ability to remain in compliance with the limit, even if all subsidiaries slightly exceed the internal limits on the same side of the market at the same time.

reports on Commission Form 40.<sup>112</sup> However, the Commission is not persuaded that these reports are a sufficient substitute for the position limits regime. While these reports provide some information necessary for surveillance of positions, some owned entities may not file these reports. On a more fundamental level, the Commission believes that compliance with the position limit rules, including aggregation of the positions of owned entities, is primarily the responsibility of the owned entities and their owners. Even if the information on Form 40 were sufficient, it would be impractical and inefficient for the Commission to use that information to monitor compliance with the position limit rules, as compared to the ability of the entities themselves to maintain compliance with the position limits.

d. Consideration of Alternatives Suggested by Commenters

Regarding the requests for specific exemptions or other special treatment for various types of entities or situations, such as investment companies, pension plans, passive index-tracking commodity pools, and cases of transitory ownership, the Commission is not persuaded that any further relief for such entities (i.e., beyond the relief already provided in the final rule) would justify the complexity of applying the new rules that would be necessary for such specific treatment, which would likely include definitional rules to set out the scope of entities that qualify for the special treatment. For example, the Commission believes that distinguishing “transitory” ownership from other forms of ownership would be more complicated than completing the notice required to obtain relief, and in such situations it is reasonable to expect that the notice filing would be made on a summary basis appropriate to the transitory situation.

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<sup>112</sup> See 17 CFR part 18, Appendix A.

The Commission reached a similar conclusion regarding the suggestions for different types of filings in various situations. Again, the Commission believes that the filing required by rule 150.4(c) is relatively simple because it requires only a description of the relevant circumstances that warrant disaggregation, and a statement certifying that the conditions set forth in the applicable aggregation exemption provision have been met. Therefore, the complexity of determining which filing to provide in various situations would be greater than that involved in completing the required filing.

As for the commenters that suggested certain categories of persons (such as passive investors) should be exempt from the aggregation requirement without making any filing at all, the Commission concluded that this approach would put at risk the satisfactory experience under the existing regulation, under which aggregation is required without exemption. For this reason, the Commission did not propose to provide categorical exemptions from the aggregation requirement. As explained above, the Commission believes it is important that its staff be able to conduct ongoing surveillance and monitoring of disaggregation filings and related information for red flags. If greater than 10 percent owners were permitted to avoid the aggregation requirement without making any filing, there could be a greater potential for circumvention of position limits.

Last, the Commission emphasizes that the categories of relief from the aggregation requirement set forth in the final rule do not limit the Commission's existing authority under section 4a(a)(7) of the CEA to grant exemptions from the aggregation requirement on a case-by-case basis.

B. Criteria for Aggregation Relief in Rule 150.4(b)(2)(i)

1. Proposed Approach

The proposed criteria to claim relief addressed the Commission's concerns that an ownership or equity interest of 10 percent and above may facilitate or enable control over trading of the owned entity, or allow a person to accumulate a large position through multiple accounts that could overall amount to an unduly large position.<sup>113</sup> The Proposed Rule grouped these criteria into five paragraphs in proposed rule 150.4(b)(2)(i). The Commission stated its intent that these criteria would be interpreted and applied in accordance with the Commission's past practices in this regard.<sup>114</sup> In accordance with these precedents, the Commission would not expect that the criteria would impose requirements beyond a reasonable, plain-language interpretation of the criteria. For example, routine pre- or post-trade systems to effect trading on an operational level (such as trade capture, trade risk or order-entry systems) would not, broadly speaking, have to be independently developed in order to comply with the criteria. Also, employees that do not direct or participate in an entity's trading decisions would generally not be subject to these requirements.

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<sup>113</sup> The Proposed Rule noted that the criteria would apply to the person filing the notice as well as the owned entity. See Proposed Rule, 78 FR at 68961. In addition, the Proposed Rule noted that for purposes of meeting the criteria, such "person" would include any entity that such person must aggregate pursuant to proposed rule 150.4. For example, if company A files a notice under proposed rule 150.4(c) for company A's equity interest of 30 percent in company B, then company A must comply with the conditions for the exemption, including any entity with which company A aggregates positions under proposed rule 150.4. In this connection, if company A controlled the trading of company C, then company A's 150.4(c) notice filing must demonstrate that there is independence between company B and company C. See id.

<sup>114</sup> See id., citing 1979 Aggregation Policy, 44 FR 33839 (providing indicia of independence); CFTC Interpretive Letter No. 92-15 (CCH ¶ 25,381) (ministerial capacity overseeing execution of trades not necessarily inconsistent with indicia of independence); 1999 Amendments, 64 FR at 24044 (intent in issuing final aggregation rule "merely to codify the 1979 Aggregation Policy, including the continued efficacy of the [1992] interpretative letter").



Proposed rule 150.4(b)(2)(i)(A) would condition aggregation relief on a demonstration that the person filing for disaggregation relief and the owned entity do not have knowledge of the trading decisions of the other. The Commission noted its preliminary belief that where an entity has an ownership interest in another entity and neither entity shares trading information, such entities demonstrate independence.<sup>115</sup> In contrast, persons with knowledge of trading decisions of another in which they have an ownership interest are likely to take such decisions into account in making their own trading decisions, which implicates the Commission's concern about independence and enhances the risk for coordinated trading.<sup>116</sup> This proposed criterion would address concerns regarding knowledge of employees who control, direct or participate in an entity's trading decisions, and would not prohibit information sharing solely for risk management, accounting, compliance, or similar purposes and information sharing among mid- and back-office personnel that do not control, direct or participate in trading decisions. In the Proposed Rule, the Commission clarified that this criterion would generally not require aggregation solely based on knowledge that a party gains during execution of a transaction regarding the trading of the counterparty to that transaction, nor would it encompass knowledge that an entity would gain when carrying out due

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<sup>115</sup> See Proposed Rule, 78 FR at 68961.

<sup>116</sup> As noted in the Proposed Rule, the Commission does not consider knowledge of overall end-of-day position information to necessarily constitute knowledge of trading decisions, so long as the position information cannot be used to dictate or infer trading strategies. As such, the knowledge of end-of-day positions for the purpose of monitoring credit limits for corporate guarantees does not necessarily constitute knowledge of trading information. However, the ability to monitor the development of positions on a real time basis could constitute knowledge of trading decisions because of the substantial likelihood that such knowledge might affect trading strategies or influence trading decisions of the other. See *id.*

diligence under a fiduciary duty, so long as such knowledge is not directly used to affect the entity's trading.<sup>117</sup>

Proposed rule 150.4(b)(2)(i)(B) would condition aggregation relief on a demonstration that the person seeking disaggregation relief and the owned entity trade pursuant to separately developed and independent trading systems. Further, proposed rule 150.4(b)(2)(i)(C) would condition relief on a demonstration that such person and the owned entity have, and enforce, written procedures to preclude the one entity from having knowledge of, gaining access to, or receiving data about, trades of the other. Such procedures would have to include document routing and other procedures or security arrangements, including separate physical locations, which would maintain the independence of their activities. As noted in the Proposed Rule, the Commission has applied these same conditions in connection with the IAC exemption to ensure independence of trading between an eligible entity and an affiliated IAC.<sup>118</sup> Similar to the IAC exemption, proposed rule 150.4(b)(2) would permit disaggregation in certain circumstances where there is independence of trading between two entities. Thus, the Commission proposed these conditions, which were already applicable and working well

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<sup>117</sup> As explained in the Proposed Rule, proposed paragraph (A) was along the lines suggested by commenters on the proposed amendments to part 151. These commenters had said that the limits on sharing information between the person and the owned entity should not apply to employees that do not direct or influence trading (such as attorneys or risk management and compliance personnel), although the employees may have knowledge of the trading of both the person and the owned entity. Also, a commenter representing employee benefit plan managers said that restrictions on information sharing are, in general, a problem for plan managers, which have a fiduciary duty to inquire as to an owned entities' activities, so the Commission should recognize that acting as required by fiduciary duties does not constitute a violation of the information sharing restriction. And a commenter had said that information sharing resulting when the person and the owned entity (or two owned entities) are counterparties in an arm's length transaction should not be a violation of the rule. See id.

<sup>118</sup> See id. See also existing regulation 150.3(a)(4). Such conditions have been useful in ensuring that trading is not coordinated through the development of similar trading systems, and that procedures are in place to prevent the sharing of trading decisions between entities.

in the IAC context, and which were expected to strengthen the independence between the two entities for the owned entity exemption.

The Commission proposed that the phrase “separately developed and independent trading systems” be interpreted in accordance with the Commission’s prior practices in this regard.<sup>119</sup> The Commission stated that it generally would not expect that this criterion would prevent an owner and an owned entity from both using the same “off-the-shelf” system that is developed by a third party.<sup>120</sup> Rather, the concern driving the Commission’s proposal was that trading systems (in particular, the parameters for trading that are applied by the systems) could be used by multiple parties who each know that the other parties are using the same trading system as well as the specific parameters used for trading and, therefore, are indirectly coordinating their trading.<sup>121</sup>

The requirement of “separate physical locations” in proposed rule 150.4(b)(2)(i)(C) would not necessarily require that the relevant personnel be located in separate buildings. In the Proposed Rule, the Commission stated that the important factor is that there be a physical barrier between the personnel that prevents access between the personnel that would impinge on their independence.<sup>122</sup> For example, locked doors with restricted access would generally be sufficient, while merely providing the purportedly

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<sup>119</sup> See, e.g., 1979 Aggregation Policy, 44 FR at 33840-1 (futures commission merchant (FCM) “deemed to control” trading of customer accounts in trading program where FCM gives specific advice or recommendations not made available to other customers, unless such accounts and programs are traded independently and for different purposes than proprietary accounts).

<sup>120</sup> Commenters on the proposed amendments to part 151 had said that this requirement should not prevent the use of third party “off-the-shelf” execution algorithms, should permit the sharing of virtual documentation, so long as such document can be accessed only by persons that do not manage or control trading, and should apply only to systems that direct trading decisions, but not trade capture, trade risk or trade facilitation systems. See Proposed Rule, 78 FR at 68962.

<sup>121</sup> Compare 1979 Aggregation Policy, 44 FR at 33841. “However, the Commission also recognizes that purportedly different programs which in fact are similar in design and purpose and are under common control may be initiated in an attempt to circumvent speculative limit and reporting requirements.”

<sup>122</sup> See Proposed Rule, 78 FR at 68962.

“independent” personnel with desks of their own would not. Similar principles would apply to sharing documents or other resources.

Proposed rule 150.4(b)(2)(i)(D) would condition aggregation relief on a demonstration that the person does not share employees that control the owned entity’s trading decisions, and the employees of the owned entity do not share trading control with such persons. The Proposed Rule noted the Commission’s concern that shared employees with control of trading decisions may undermine the independence of trading between entities.<sup>123</sup> Regarding the sharing of attorneys, accountants, risk managers, compliance and other mid- and back-office personnel, the Commission proposed that sharing of such personnel between entities would generally not compromise independence so long as the employees do not control, direct or participate in the entities’ trading decisions.<sup>124</sup> Similarly, sharing of board or advisory committee members, research personnel or sharing of employees for training, operational or compliance purposes would not result in a violation of the criteria if the personnel do not influence (e.g., “have a say in”) or direct the entities’ trading decisions.<sup>125</sup>

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<sup>123</sup> Commenters on the proposed amendments to part 151 said this criteria should not prohibit sharing of board or advisory committee members who do not influence trading decisions, sharing of research personnel, or sharing for training, operational or compliance purposes, so long as trading of the person and the owned entity remains independent. See id.

<sup>124</sup> As noted in the Proposed Rule, the condition barring the sharing of employees that control the owned entity’s trading decisions would include a prohibition on sharing of attorneys, accountants, risk managers, compliance and other mid- and back-office personnel, to the extent such employees participate in control of the trading decisions of the person or the owned entity. See id.

<sup>125</sup> In this respect, proposed rule 150.4(b)(2)(i)(D) was consistent with the Commission’s Interpretive Letter No. 92-15 (CCH ¶ 25,381), where an employee both oversaw the execution of orders for a commodity pool, as well as maintained delta neutral option positions in non-agricultural commodities for the proprietary account of an affiliate of the sponsor of the commodity pool. The Commission concluded that the use of clerical personnel who are dual employees of both affiliates would not require aggregation when the clerical personnel engage in ministerial activities and steps are taken to maintain independence, such as: (i) limiting trading authority so that the personnel do not have responsibility for the two entities’ activities in the same commodity; and (ii) separating the times at which the personnel conduct activities for the two entities.

Proposed rule 150.4(b)(2)(i)(E) would condition aggregation relief on a demonstration that the person and the owned entity do not have risk management systems that permit the sharing of trades or trading strategies with the other. This condition was intended to address concerns that risk management systems that permit the sharing of trades or trading strategies with each other present a significant risk of coordinated trading through the sharing of information.<sup>126</sup> The Commission proposed that this criterion generally would not prohibit sharing of information to be used only for risk management and surveillance purposes, when such information is not used for trading purposes and not shared with employees that, as noted above, control, direct or participate in the entities' trading decisions.<sup>127</sup> Thus, sharing with employees who use the information solely for risk management or compliance purposes would generally be permitted, even though those employees' risk management or compliance activities could be considered to have an "influence" on the entity's trading.

## 2. Commenters' Views

As a general matter, some commenters said that the disaggregation criteria in the Proposed Rule were appropriately stated. One described the disaggregation criteria as a balanced and effective approach that gets to the heart of the Commission's aggregation policy, while another said the criteria provide appropriate indications of whether an owner has knowledge or control of the trading activity of an owned entity.<sup>128</sup> On the

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<sup>126</sup> The Commission remains concerned, as stated in the Proposed Rule and as noted above, that a trading system, as opposed to a risk management system, that is not separately developed from another system can subvert independence because such a system could apply the same or similar trading strategies even without the sharing of trading information. See Proposed Rule, 78 FR at 68962.

<sup>127</sup> See id.

<sup>128</sup> See CL-Sempra Nov 13 and CL-EEI Nov 13, respectively. A third commenter thought the criteria are reasonable and practicable, but cautioned that it is difficult to eliminate knowledge sharing between related business entities, citing Paul Volcker describing as naïve the view that "Chinese Walls can remain

other hand, another commenter believed that the criteria are vague and unclear, especially for global enterprises which are active in more than one aspect of a market (e.g., both production and trading activities).<sup>129</sup>

Set forth below is a brief discussion of the comments on each aspect of the proposed disaggregation criteria.

a. Proposed rule 150.4(b)(2)(i)(A) – no shared knowledge of trading decisions

Commenters said that passive investors in an owned entity should be required to certify only that they have no knowledge of the owned entity's trading, not whether the owned entity has knowledge of the trading of the passive investors (i.e., the owners), since passive investors would not have insight into the knowledge of the owned entity.<sup>130</sup>

One commenter asked that the Commission clarify that the gain of information as a counterparty to a transaction would not in itself violate this criterion regardless of how the information is transmitted.<sup>131</sup>

Another commenter questioned how this criterion would be applied to trading decisions triggered by an algorithm over which human intervention is rarely exercised. For example, the commenter asserted that the use of off-the-shelf third party algorithms by entities owned by a single owner could enable a de facto coordination without intentional indirect coordination.<sup>132</sup>

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impermeable against the pressures to seek maximum profit and personal remuneration.” See Chris Barnard on November 12, 2015.

<sup>129</sup> See CL-Wilmar Nov 13.

<sup>130</sup> See CL-SIFMA AMG Nov 13; CL-MFA Nov 12; CL-AIMA Feb 10. One of these commenters said that, as a general matter, it can be very difficult for owners to obtain information about owned entities, e.g., when the owned entity is in a different country. CL-MFA Nov 12

<sup>131</sup> See Coalition of Physical Energy Companies on February 10, 2014 (“CL-COPE Feb 10”).

<sup>132</sup> See Institute for Agriculture and Trade Policy on February 10, 2014 (“CL-IATP Feb 10”).

- b. Proposed rule 150.4(b)(2)(i)(B) – have separately developed and independent trading systems

Several commenters suggested that the Commission modify this paragraph so that it refers to “trading strategies” instead of “trading systems.” That is, they suggested that the paragraph require that the owner and the owned entity “Trade pursuant to separately developed and independent trading strategies.” One commenter was of the view that because proposed rule 150.4(b)(2)(i)(A) would require that the owner and the owned entity not have shared knowledge of trading decisions, there is no need for this paragraph to require separate “trading systems” when the purpose of this rule should be to prohibit use of “trading strategies” that were developed in coordination.<sup>133</sup> The commenter believed that this change would allow the owner and the owned entity to utilize a single shared system for trading, which would be appropriate and could enhance risk management so long as the owner and the owned entity can demonstrate that the condition of no shared knowledge of trading decisions is met.<sup>134</sup>

Other commenters remarked that a change in the rule text from “trading systems” to “trading strategies” would allow corporate groups to take advantage of economies of

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<sup>133</sup> See CL-IECA Nov 13. See also CL-CME Nov 13 (criteria should focus on ensuring that the entities do not share knowledge of or control over trading, which would not be implicated merely because they trade pursuant to commonly-developed trading systems).

<sup>134</sup> This commenter also said that, at a minimum, the Commission should distinguish between front-end systems (used for trade capture and trade booking) and back-end systems (used for risk management and trade reporting). See CL-IECA Nov 13.

Another commenter described “trade capture systems” as distinct from trading strategies. This commenter said trade capture systems are used to track positions on an enterprise-wide basis across multiple affiliates for risk management, recordkeeping and other business purposes, but these systems do not direct trading and use of a shared trade capture system does not mean that the entities have adopted or employed identical, or even similar, trading strategies. See CL-EEI Nov 13.

A third commenter referred to trade capture, trade execution, and related report-generation systems for the confirmation, booking and accounting of orders and for any other mid- and back-office functions. This commenter asserted that since such systems merely record, process, and facilitate reports of trading, but do not establish parameters (e.g., algorithms) for trading, their use by multiple entities should be permitted under this criterion so long as they do not enable coordinated trading. See CL-Energy Transfer Nov 13.

scale by having one trading system developed for multiple companies in the group, and promote efficient trading and risk management practices through the development of trading technologies that are unrelated to trading strategy.<sup>135</sup> A commenter representing investment managers said that disaggregation relief should be available if the original investment decisions are made independently, even if trades are subsequently executed and risk managed on an aggregated basis using a single system.<sup>136</sup>

Commenters referred to the Commission’s statement in the Proposed Rule that it generally would not expect that this criterion would prevent an owner and an owned entity from both using the same “off-the-shelf” system that is developed by a third party.<sup>137</sup> The commenters asked that this guidance be reiterated in the final rule and be extended beyond off-the-shelf systems or other technologies “developed by” third parties, to include any in-house software or custom modules added to third-party software, so long as these internal systems are not used to share trading information with day-day trading personnel or otherwise permit coordinated trading.<sup>138</sup>

On the other hand, another commenter said that the application of this criterion, which implicitly assumes that market participants will self-report common trading strategies, fails to recognize that the participants may be reluctant to report collusive

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<sup>135</sup> See CL-CME Nov 13; CL-FIA Nov 13; CL-FIA Feb 6.

<sup>136</sup> This commenter said it would be appropriate for trading strategies of separate investment vehicles to be executed via a single execution desk, as long as the vehicles’ portfolio managers were not coordinating placement of the trades, in order to achieve risk management goals such as to avoid cross and wash trading or the submission of an excessive numbers of orders, to avoid having vehicles bid against each other, to monitor other trading thresholds, and to achieve fair terms of execution and aggregation. See CL-AIMA Nov 12.

<sup>137</sup> See Proposed Rule, 78 FR at 68962.

<sup>138</sup> See CL-SIFMA AMG Nov 13; CL-AIMA Feb 10; CL-Energy Transfer Nov 13.



strategies, and therefore DCMs and SEFs should be required to analyze market data for trading strategy correlations.<sup>139</sup>

- c. Proposed rule 150.4(b)(2)(i)(C) – have written procedures to maintain independence, including separate physical locations

A commenter said that the requirement to meet this criteria (to have written procedures restricting access to trading information) should apply only to the owner claiming the exemption from aggregation, and not the owned entity, because depending on the extent of an owner’s corporate control over an owned entity, the owner may not be in a position to compel the owned entity to establish the written procedures.<sup>140</sup> This commenter believes that so long as the owner has and enforces written procedures that preclude the owner from sharing trading information with, and receiving trading information from, the owned entity, then each entity will not have access to the information of the other.<sup>141</sup>

Another commenter suggested that the second sentence of this provision should be deleted because, this commenter believes, it is subsumed by the first sentence and such prescriptive criteria are unnecessary in the context of a physical commodity firm as opposed to an IAC.<sup>142</sup> The commenter also asked that the Commission clarify that the requirement of “separate physical locations” does not require physically separate buildings, but rather requires only restricted access prohibiting personnel from entering

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<sup>139</sup> See Occupy the SEC on August 7, 2014 (“CL-Occupy the SEC Aug 7”).

<sup>140</sup> See FIA on July 31, 2014 (“CL-FIA July 31”) and CL-FIA Nov 13.

<sup>141</sup> See *id.*

<sup>142</sup> See CL-Energy Transfer Nov 13. The second sentence reads “Such procedures must include document routing and other procedures or security arrangements, including separate physical locations, which would maintain the independence of their activities.” The commenter said that if the second sentence is retained, the Commission should provide guidance that the routing of documents to senior management or risk management personnel, and the routing of documents that show aggregate, non-granular, or stale trading positions, may be acceptable so long as such routing does not allow coordinated trading.

the affiliated company without permission or signing-in or, if on the derivatives trading floors, an escort.<sup>143</sup>

On the other hand, another commenter said that this criterion should be strengthened to provide realistic guidelines for meaningful separations of location and information, because the statute requires an entity to cease trading commodity derivatives in multiple divisions separated by “mere ‘Chinese walls’” and it is not within the discretion of the Commission to waive this requirement.<sup>144</sup> This commenter cited a research paper which asserted “that in important contexts Chinese walls fail to prevent the spread of non-public information within financial conglomerates.”<sup>145</sup>

d. Proposed rule 150.4(b)(2)(i)(D) – no shared employees that control trading decisions

A commenter said that the Commission should clarify that this criterion may be met if a shared employee participates on the board but does not control, direct or participate in the trading decisions.<sup>146</sup> Another commenter requested that the Commission clarify that guidance in the Proposed Rule about research personnel not influencing or directing the entities’ trading decisions is properly interpreted to mean that research personnel are not precluded by this criterion from providing market research (including, for example, market fundamentals or technical indicators, support or resistance levels, and trade recommendations), so long as the research personnel do not direct or control trading decisions of the owned entities.<sup>147</sup>

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<sup>143</sup> See *id.*

<sup>144</sup> See Better Markets, Inc. on February 10, 2014 (“CL-Better Markets Feb 10”).

<sup>145</sup> See *id.*

<sup>146</sup> See CL-COPE Feb 10.

<sup>147</sup> See CL-MFA Feb 7, referring to Proposed Rule, 78 FR at 68962.

- e. Proposed rule 150.4(b)(2)(i)(E) – no risk management systems that permit the sharing of trades or trading strategy

Several commenters focused on a statement in the Proposed Rule that the Commission would interpret this criterion not to prohibit sharing of information for risk management purposes, so long as the information is not used for trading purposes or shared with employees that participate in trading decisions.<sup>148</sup> These commenters asked that the Commission reiterate this guidance in the final rule.<sup>149</sup> Other commenters said that the guidance should be set forth as part of the text of the final rule, in order to provide a safe harbor, or greater certainty, for the sharing of risk management information.<sup>150</sup>

A commenter asked the Commission to state that this criterion would not preclude disaggregation relief when there is sharing of information for only risk management and surveillance and other non-trading purposes, such as, for example, information used to assess collateral requirements or verify compliance with applicable credit limits or

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<sup>148</sup> See CL-AIMA Feb 10, citing Proposed Rule, 78 FR at 68962 (“this criterion generally would not prohibit sharing of information to be used only for risk management and surveillance purposes, when such information is not used for trading purposes and not shared with employees that, as noted above, control, direct or participate in the entities’ trading decisions. Thus, sharing with employees who use the information solely for risk management or compliance purposes would generally be permitted, even though those employees’ risk management or compliance activities could be considered to have an ‘influence’ on the entity’s trading.”). See also CL-ISDA Nov 12; CL-SIFMA AMG Nov 13; CL-PEGCC Nov 12; CL-CME Nov 13.

<sup>149</sup> See CL-ISDA Nov 12; CL-SIFMA AMG Nov 13; CL-PEGCC Nov 12; CL-CME Nov 13; CL-AIMA Feb 10.

<sup>150</sup> See CL-FIA Nov 13; CL-FIA July 31; CL-NGSA Nov 13; Commodity Markets Council on February 10, 2014. Another commenter suggested that the rule text should provide that owners and their affiliates may share such trading information as is necessary to manage risk and meet compliance obligations. See CL-Working Group Nov 13 (suggesting rule text allowing “obtaining such information as is necessary to fulfill [the entity’s] fiduciary duties or fulfill its duty to supervise the trading activities of an affiliate, or ... establishing and monitoring compliance or risk policies and procedures, including position limits, for an affiliate or on an enterprise wide basis, or ... sharing employees so long as such employees do not control, direct or participate in the entities’ trading decisions”).

information maintained by a custodian or other service provider that does not control trading.<sup>151</sup>

Other commenters suggested various formulations for Commission guidance or rule text to set out circumstances in which this criterion would be interpreted not to preclude disaggregation relief, so long as the employees who have access to the shared information do not control, direct or participate in the entities' trading decisions. The circumstances suggested by commenters include:

- information sharing as is necessary to fulfill fiduciary duties or duties to supervise trading, or to monitor risk limits on an enterprise wide basis;<sup>152</sup>
- sharing of transaction and position information with and among employees who perform risk management, accounting, compliance or similar mid- and back-office functions;<sup>153</sup>
- information sharing for risk management purposes;<sup>154</sup>
- continuous sharing of position information for risk management and surveillance purposes only, sharing of trading and position information for risk management purposes (even on a real-time basis and even if the entity's risk management systems or personnel have authority to require the reduction of positions to comply with applicable limits), and using shared risk

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<sup>151</sup> This commenter asserted that the condition that the owner entity and owned entity "do not have risk management systems that permit the sharing of trades or trading strategy" is ambiguous and potentially overly broad. See CL-ISDA Nov 12.

<sup>152</sup> See CL-CMC Nov 13.

<sup>153</sup> See CL-CME Nov 13.

<sup>154</sup> See CL-COPE Nov 13. See also CL-AIMA Feb 10 (criterion should not preclude shared risk management systems from allowing access to share trade and trading strategies by individuals who do not exercise control over trading decisions); CL-ECOM Nov 13 (criterion should not preclude information sharing for risk management and compliance purposes).

management services, including real-time data sharing and position reduction mechanisms, so long as they do not permit coordinated or shared trading;<sup>155</sup>

- sharing of derivative information with senior management or risk committee members that oversee the risks of more than one operating company, for risk management, accounting, compliance, or similar purposes (even if these personnel have authority to reduce exposure or comply with internal risk guidelines), and sharing of trading and position information for risk management purposes, even if such information is shared on a real-time or end-of-day basis and even if the risk management systems or personnel have authority to reduce positions to comply with applicable limits or other restrictions that senior management or the risk personnel may impose;<sup>156</sup> and
- information sharing resulting from use of an affiliated service provider, such as an affiliated FCM, an affiliated custodian, an affiliate engaged in recordkeeping or reporting information, or an affiliate providing clearing, custodial, or other non-trading services for the owned entity.<sup>157</sup>

Commenters also asserted that employees at the owner entity who are not directly or indirectly involved in trading or the supervision of traders, and are prohibited from sharing information with owner entity traders, should be permitted to receive trading activity and position exposure information of the owned entity,<sup>158</sup> and that the categories of employees referred to in the guidance in the Proposed Rule are not intended to be restrictive, so that, for example, entities could share sales staff without leading to shared

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<sup>155</sup> See CL-SIFMA AMG Nov 13.

<sup>156</sup> See CL-Energy Transfer Nov 13.

<sup>157</sup> See CL-ISDA Nov 12.

<sup>158</sup> See *id.*

knowledge of trading decisions.<sup>159</sup> Another commenter said that the Commission should interpret this criterion not to preclude disaggregation relief when information sharing is limited to employees involved in risk-management, compliance, execution or recordkeeping functions, so long as the functions are conducted pursuant to written procedures that protect the information from access by individuals involved in trading decisions, and there is no access by individuals who develop or execute trading strategies to the information shared for risk management.<sup>160</sup>

### 3. Final Rule

The Commission is adopting rule 150.4(b)(2)(i) largely as proposed, with certain modifications described below in response to commenters and other considerations.

First, the lead in sentence of rule 150.4(b)(2)(i) includes the addition of the phrase “(to the extent that such person is aware or should be aware of the activities and practices of the aggregated entity or the owned entity).” The effect of adding this phrase is to apply the criteria in this rule to both the person who is required to aggregate positions and the aggregated or owned entity, but only to the extent that the person required to aggregate is aware or should be aware of the activities and practices of the aggregated or owned entity. This addition recognizes that, as commenters pointed out, an owner may not have knowledge of or an ability to find out about the trading practices of an owned entity. The Commission understands the phrase “should be aware” to mean that the owner is charged with awareness of the owned entity’s activities if it is, in effect, able to control the owned entity or routinely has access to relevant information about the owned

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<sup>159</sup> See CL-AIMA Feb 10, referring to Proposed Rule, 78 FR at 68962.

<sup>160</sup> See CL-ICE Nov 13.

entity. If the owner is not aware, and should not be aware, of the owned entity's activities, it would not have to certify as to the owned entity.

The Commission believes that this modification addresses the comments on subparagraph (A) to the effect that passive investors in an owned entity should be required to certify only that they have no knowledge of the owned entity's trading. Therefore, the final rule adopts subparagraph (A) as it was proposed.

The final rule adopts subparagraph (B), relating to separately developed and independent trading systems, as it was proposed. The term "system" is appropriately broad to encompass the various methods, procedures and plans which market participants may use to initiate trading. "Trading system" includes, for example, a program (whether automated or not) that provides the impetus for the initiation of trades. The suggested alternative, "strategy," is too narrowly limited to the particular trading decisions a person may make based on particular conditions. The entire "trading system," not just the "trading strategy," must be separately developed and independent.<sup>161</sup>

The Commission reiterates that, as stated in the Proposed Rule, the purpose of this requirement is to preclude use of a trading system to coordinate the trading of two or more entities.<sup>162</sup> Thus, it is the trading system that provides the impetus for the initiation of trades which must be separately developed and independent, not the mechanism or software that carries out those trades. For this reason, the Commission does not believe that use of a shared order execution platform, with appropriate firewalls, would

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<sup>161</sup> The Proposed Rule noted that "off-the-shelf" software could be considered to be separately developed and independent for this purpose, so long as the software could not be used by multiple parties to indirectly coordinate their trading. See Proposed Rule, 78 FR at 68962. The Commission reaffirms this position, and in response to commenters (see footnote 138, above), clarifies that customized software or in-house software could also be considered to be separately developed and independent for this purpose, so long as the same standard is met.

<sup>162</sup> See Proposed Rule, 78 FR at 68962.

necessarily mean that this condition is not met. For purposes of the final rule, an “order execution platform” is a computerized process that accepts inputs of terms of trades desired to be made and then uses pre-determined methods to specifically place those trades in the markets, while a “trading system” is a process or method for deciding on the timing and direction of trades.<sup>163</sup> Thus, for purposes of the final rule the Commission understands the term “trading system” not to include an order execution platform. Nor would the term “trading system” include systems used for back-office functions such as order capture or trade reporting. Also, a trading system does not include broad principles to guide trading (e.g., principles one may learn from publicly-available literature).

Subparagraph (C) of the final rule, relating to written procedures to maintain independence, including separate physical locations, reflects the deletion of the phrase “document routing and other procedures or” from the second sentence. The Commission believes that the concept of document routing is outmoded and possibly confusing (and the concept is adequately described by the general phrase “security arrangements” which is retained in the final rule).<sup>164</sup>

For the avoidance of doubt, the Commission reiterates its guidance from the Proposed Rule on the reference in subparagraph (C) to separate physical locations.<sup>165</sup> Subparagraph (C) would not necessarily require that the relevant personnel be located in separate buildings. The important factor is that there be a physical barrier between the

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<sup>163</sup> For example, Trader A may use a trading system to develop trading ideas, and then use a widely-used order execution platform to execute those ideas, while affiliated Trader B (with no knowledge of Trader A’s trading system) may qualify for disaggregation when Trader B uses an independent trading system to develop trading ideas, and executes those ideas on the same order execution platform that Trader A uses, provided Trader B does not have access to Trader A’s executions (and vice versa).

<sup>164</sup> For consistency, the phrase “document routing and other procedures or” is also deleted from rule 150.4(b)(4)(i)(A).

<sup>165</sup> See Proposed Rule, 78 FR at 68962.



personnel that prevents access between the personnel that would impinge on their independence. For example, locked doors with restricted access would generally be sufficient, while merely providing the purportedly “independent” personnel with desks of their own would not. Similar principles would apply to sharing documents or other resources.

The final rule adopts subparagraph (D), relating to sharing of employees that control trading decisions, as it was proposed. For the avoidance of doubt, the Commission reiterates, as it stated in the Proposed Rule, that the sharing of attorneys, accountants, risk managers, compliance and other mid- and back-office personnel between entities would generally not compromise independence so long as the employees do not control, direct or participate in the entities’ trading decisions.<sup>166</sup> Similarly, sharing of board or advisory committee members or research personnel, or sharing of employees for training, operational or compliance purposes, would not result in a violation of the criteria if the personnel do not influence (e.g., “have a say in”) or direct the entities’ trading decisions.<sup>167</sup>

One commenter asserted that personnel could provide research about “technical indicators, support or resistance levels, and trade recommendations” without being

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<sup>166</sup> See *id.* See also the discussion above regarding the condition under rule 150.4(b)(2)(i)(A) (conditioning aggregation relief on a demonstration that the person filing for disaggregation relief and the owned entity do not have knowledge of the trading decisions of the other, and discussing what constitutes “knowledge” for this purpose).

<sup>167</sup> In this respect, rule 150.4(b)(2)(i)(D) is consistent with the Commission’s Interpretive Letter No. 92-15 (CCH ¶ 25,381), where an employee both oversaw the execution of orders for a commodity pool, as well as maintained delta neutral option positions in non-agricultural commodities for the proprietary account of an affiliate of the sponsor of the commodity pool. In that interpretive letter, the Commission concluded that the use of clerical personnel who are dual employees of both affiliates would not require aggregation when the clerical personnel engage in ministerial activities and steps are taken to maintain independence, such as: (i) limiting trading authority so that the personnel do not have responsibility for the two entities’ activities in the same commodity; and (ii) separating the times at which the personnel conduct activities for the two entities.

deemed to be participating in trading decisions.<sup>168</sup> The Commission believes this situation should be viewed in light of a previous interpretation, where the Commission stated that it “is concerned that specific trading recommendations ... contained in such information not be substituted for independently derived trading decisions. When the person who directs trading in an account or program regularly follows the trading suggestions [from another person], such account or program will be evidence that the account is controlled by the [other person].”<sup>169</sup>

The final rule adopts subparagraph (E), relating to risk management information sharing, substantially as it was proposed, but with a revision to clarify that the provision is focused on the sharing of trades or trading strategy with employees that control the trading decisions of the other entity.<sup>170</sup> The Commission notes that provisions virtually identical to this rule have been used for years in connection with the IAC exemption, and the Commission’s interpretations of those provisions have not changed. The Commission considers this revision to the rule text to be a clarification of its existing interpretations.

Further, the Commission adopts and reiterates its guidance on this provision in the Proposed Rule.<sup>171</sup> That is, subparagraph (E) is intended to address concerns that risk management systems that permit entities to share trades or trading strategies with each other present a significant risk of coordinated trading through the sharing of

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<sup>168</sup> See CL-MFA Feb 7.

<sup>169</sup> 1979 Aggregation Policy, 44 FR at 33844.

<sup>170</sup> For example, the rule would preclude Trader A and affiliated Trader B from having a risk management system that permits the sharing of Trader A’s trades or trading strategy with employees that control the trading decisions of Trader B, or that permits the sharing of Trader B’s trades or trading strategy with employees that control the trading decisions of Trader A.

But, in conjunction with that limitation, the rule would not preclude Trader A and affiliated Trader B from having a risk management system that permits the sharing of Trader A’s trades or trading strategy with employees that handle risk management functions for Trader B but do not control its trading decisions.

<sup>171</sup> See Proposed Rule, 78 FR at 68962.

information.<sup>172</sup> The Commission intends that, generally speaking, subparagraph (E) would not prohibit sharing of information to be used only for risk management and surveillance purposes, when such information is not used for trading purposes and not shared with employees that, as noted above, control, direct or participate in the entities' trading decisions. Thus, sharing with employees who use the information solely for risk management or compliance purposes would generally be permitted, even though those employees' risk management or compliance activities could be considered to have an "influence" on the entity's trading.

In response to questions from commenters, the Commission believes that transaction and position information may be shared among the risk assessment employees of a single entity or of affiliated entities as is necessary for certain explicitly specified risk and compliance purposes, such as complying with internal credit limits or fulfilling a fiduciary responsibility with respect to a third party's investment. However, transaction and position information could not be used for non-hedging purposes or shared with employees who participate in non-hedging decisions. ("Non-hedging" is defined in this context as activities to take, or liquidate, positions that are not bona fide hedging positions.)

So long as these restrictions are satisfied, the information may be shared on a real-time basis,<sup>173</sup> and may be used to effect reductions in non-hedging positions, but such

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<sup>172</sup> The Commission remains concerned that a trading system, as opposed to a risk management system, that is not separately developed from another system can subvert independence because such a system could apply the same or similar trading strategies even without the sharing of trading information.

<sup>173</sup> The Commission emphasizes that so long as the restrictions discussed here are satisfied, the information may be shared on a real-time basis, in addition to on an end-of-day basis. As noted above, the Commission does not consider knowledge of end-of-day position information to necessarily constitute knowledge of trading decisions, so long as the position information cannot be used to dictate or infer trading strategies, but has been concerned that the ability to monitor the development of positions on a real-time basis could

reductions should be mandated by pre-established credit risk management procedures or compliance procedures regarding permissible investment activities. Within these restrictions, affiliated entities may use shared risk management services, and the information may be used for back-office recordkeeping and middle-office risk assessment, so long as such functions occur independently of any non-hedging decisions made by other employees who did not have access to shared information. Companies within an affiliated partnership or limited liability company structure (i.e., where the relevant entities are under common ownership or control) may be considered to be affiliated for this purpose.

Commenters proposed various alternative criteria which could be used to determine whether the positions of an owner and owned entity could be disaggregated.<sup>174</sup> However, after considering these suggestions, the Commission does not believe that the suggested criteria are significantly different from the criteria in rule 150.4(b)(2)(i). Also, some of the suggested criteria appear to be suitable for particular situations, but not necessarily all corporate groups.<sup>175</sup> Overall, the Commission believes that the criteria in

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constitute knowledge of trading decisions. See footnote 116, above. In response to questions from commenters, the Commission has considered the circumstances in which such information may be shared on a real-time basis, and the purpose of the discussion here is to explain when real-time sharing would be permissible.

<sup>174</sup> See, e.g., CL-MidAmerican Feb 7 and Commodity Markets Council on July 25, 2014.

<sup>175</sup> For example, one commenter recommended factors such as whether the owner and the owned entity have separate trading accounts, separate assets, separate lines of business, independent credit support and other specific indications of separation. See CL-MidAmerican Feb 7. In the Commission's view, criteria such as these are specific manifestations of the general principles stated in proposed rule 150.4(b)(2)(i) that the owner and the owned entity not have knowledge of the trading decisions of the other and trade pursuant to separately developed and independent trading systems. Similarly, whether the two entities do or do not have separate assets or separate lines of business would not necessarily indicate whether they are engaged in coordinated trading.

rule 150.4(b)(2)(i) are appropriate and suitable for determining when disaggregation is permissible due to a lack of control and shared knowledge of trading activities.<sup>176</sup>

C. Notice Filing Requirement in Rule 150.4(c)

1. Proposed Approach

The Commission proposed a notice filing requirement in proposed rule 150.4(c).<sup>177</sup> The proposed rule contemplated that the filing would be made before the exemption from aggregation is needed, since the filing would be a pre-requisite for obtaining the exemption. However, where a prior filing is impractical (such as where a person lacks information regarding a newly-acquired subsidiary's activities), the Commission proposed that the filing should be made as promptly as practicable.<sup>178</sup>

Even though a filing under proposed rule 150.4(c) could be made after an ownership or equity interest is acquired, the Commission proposed that the exemption from aggregation would not be effective retroactively because the filing is a pre-requisite to the exemption. The Commission reasoned that retroactive application of such filings could result in administrative difficulty in monitoring the scope of exemptions from aggregation and negatively affect the Commission staff's surveillance efforts.<sup>179</sup>

Generally, the Commission proposed that entities could consolidate their filings in any efficient manner by, for example, discussing more than one owned entity in a single

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<sup>176</sup> The criteria in rule 150.4(b)(2)(i) will be interpreted and applied in accordance with the Commission's past practices. See footnote 114, above.

<sup>177</sup> The Commission also proposed an application procedure for ownership interests of more than 50 percent in proposed rule 150.4(c)(2). However, since the Commission is not adopting proposed rule 150.4(b)(3), that application procedure is not relevant and the Commission is not adopting proposed rule 150.4(c)(2). The text of rule 150.4(c)(2) in the final rule is a new provision discussed below.

<sup>178</sup> See Proposed Rule, 78 FR at 68962.

<sup>179</sup> See id.

filing, so long as the scope of the filing is made clear.<sup>180</sup> The Commission also emphasized that if an entity determines to no longer apply an exemption (or if an exemption is no longer available), the entity would be required to inform the Commission by making a filing under proposed rule 150.4(c) because this would constitute a material change to the prior filing. Of course, once an exemption no longer applies to an owned entity, the person would be required to subsequently aggregate the positions of the entity in question.<sup>181</sup>

## 2. Commenters' Views

Commenters addressed the time limit for making the proposed notice filing, the situations in which subsequent filings (after the initial notice) should be required, the consequences for failure to make a timely filing, the contents of the notice filing and how the notice filing should be signed.

Regarding the time limit for making the proposed notice filing, commenters said the rule should provide a reasonable period of time to file, in order to perform due diligence and gather information. Several commenters suggested that a three-month grace period would be reasonable before requiring aggregation, because this would be adequate to conduct the internal review to support and approve the notice filing.<sup>182</sup>

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<sup>180</sup> In the Proposed Rule, the Commission clarified that section 8 of the CEA would apply to the information that the Commission may request under proposed rule 150.4(c), and sets out the extent to which such information will be treated confidentially. See id.

<sup>181</sup> See id.

<sup>182</sup> See CL-CME Nov 13; CL-PEGCC Nov 12; CL-FIA Nov 13; CL-FIA July 31; CL-ISDA Nov 12; CL-Energy Transfer Nov 13. One of these commenters allowed that aggregation would be required if, during the grace period, an owner entity takes active steps to control and direct the trading strategy of a newly acquired owned entity. See CL-ISDA Nov 12. The three month time period was said to be adequate for a new owned entity to undertake post-closing diligence and operational measures to confirm whether seeking or claiming the aggregation exemption is necessary. See CL-Energy Transfer Nov 13. Another commenter suggested a grace period, but did not suggest a specific time period. See CL-SIFMA AMG Nov 13.

Regarding the situations in which subsequent filings (after the initial notice) should be required, several commenters stated that a subsequent filing should be required only in the event of a material change to the facts set forth in the relevant notice filing.<sup>183</sup> One commenter thought that a subsequent filing should be required only if there was a change in the ability to comply with the conditions of the exemption so that the criteria for disaggregation are no longer met, but not upon a mere internal reorganization of an affiliate which does not affect compliance with the criterion.<sup>184</sup> Another commenter said a subsequent filing should be required only when an owner entity is withdrawing the notice filing because it no longer maintains a requisite ownership interest in the owned entity, or in the event that the owner entity is no longer in compliance with the exemption criteria with respect to an owned entity or another material change in the contents of the notice filing has occurred.<sup>185</sup>

Regarding the consequences for failure to make a timely filing, one commenter proposed that the rule allow an entity five business days after exceeding a position limit to make the notice filing, if the entity is otherwise eligible to claim an exemption from aggregation and was deemed in excess of a position limit only because of aggregation from which it could have been exempt.<sup>186</sup> Another commenter said that if an entity is eligible to claim an exemption from aggregation, but fails to make a timely notice filing, that should constitute only a single violation for failure to make the filing, not a separate

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<sup>183</sup> See CL-Working Group Nov 13; CL-EEI Nov 13; CL-FIA Nov 13; CL-NGSA Nov 13; CL-CME Nov 13.

<sup>184</sup> See CL-Energy Transfer Nov 13.

<sup>185</sup> See CL-ISDA Nov 12.

<sup>186</sup> See CL-CME Nov 13.

violation of position limits.<sup>187</sup> Other commenters addressed a slightly different situation, contending that if a market participant relies on an exemption from aggregation in good faith, but the Commission subsequently determines that an exemption was not available, the Commission should require aggregation only from the date of its determination.<sup>188</sup>

Regarding the contents of the notice filing, two commenters requested that the Commission remove the requirement to provide a description of the relevant circumstances that warrant disaggregation in proposed rule 150.4(c)(1)(i), and instead require only a certification that the owner entity, as of the date of the filing, meets the conditions of the exemption with respect to each owned entity specified in the filing.<sup>189</sup>

Regarding signature of the notice filing, two commenters asked that the Commission clarify that the specific senior officer signing or submitting the notice filing may be any individual appropriately determined within the context of a particular owner entity's governance structure.<sup>190</sup> On the other hand, another commenter asserted that the rule should specifically require that the notice filing be signed by the CEO and the chief compliance officer or chief of risk management of the owner entity.<sup>191</sup>

### 3. Final Rule

The Commission is adopting rule 150.4(c) largely as proposed, with certain modifications to reflect points made by commenters. Primarily, rule 150.4(c) includes a modification to provide for a 60-day period after acquisition of an ownership interest to

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<sup>187</sup> This commenter asserted that this modification would not undermine the Commission's aggregation rule because it would apply only where an entity is entitled to an exemption from the aggregation requirement. See CL-FIA Nov 13.

<sup>188</sup> See CL-FIA Nov 13; CL-FIA July 31; CL-CME Nov 13; CL-IECA Nov 13.

<sup>189</sup> See CL-ISDA Nov 12 and CL-PEGCC Nov 12.

<sup>190</sup> See CL-ISDA Nov 12 and CL-PEGCC Nov 12.

<sup>191</sup> This commenter felt that the signature requirement in the proposed rule appears casual and may lead the owner entity to assume that granting of exemptions from aggregation would be routine, while they should be exceptional. See CL-IATP Feb 10.



conduct due diligence and prepare the notice filing.<sup>192</sup> In other words, a notice filing made within 60 days after an acquisition would have retroactive effect as of the date of acquisition. The Commission believes that a 60-day period would be adequate for the acquirer to perform due diligence and gather the information necessary to make the notice filing.

Rule 150.4(c) has also been modified to address a situation where a person is eligible to claim an exemption from aggregation, but does not make a filing at the proper time. In this case, rule 150.4(c)(6) provides that the failure to timely file the notice would be a violation of rule 150.4(c), but there would not be a violation of the aggregation requirement or of a position limit so long as the required filing is made within five business days after the person is aware, or should have been aware, that the notice has not been timely filed. That is, since the person was eligible to claim the exemption, aggregation was not required, but a violation of the filing requirement has occurred.

On the other hand, the Commission does not believe relief is appropriate if a person is not eligible to claim an exemption from aggregation, but erroneously believes that it is (even if the error occurs in good faith). In this case, the person could not “cure” the situation by taking steps to become eligible for the exemption, and then attempting to provide the notice filing with retroactive effect.<sup>193</sup> Where the person is not eligible for any exemption from aggregation and therefore aggregation is required, the ineligibility cannot be cured by making a later notice filing.

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<sup>192</sup> See rule 150.4(c)(2). Rule 150.4(c)(2) is new text that was not included in the Proposed Rule, but rather is adopted in response to commenters’ suggestions. As noted in footnote 177, above, the Commission is not adopting proposed rule 150.4(c)(2).

<sup>193</sup> In this regard, the Commission disagrees with commenters who argued that if a market participant relies on an exemption from aggregation in good faith, but the Commission subsequently determines that an exemption was not available, the Commission should require aggregation only from the date of its determination. See CL-FIA Nov 13; CL-FIA July 31; CL-CME Nov 13; CL-IECA Nov 13

As for a requirement to make filings subsequent to the initial filing, the Commission believes that a further filing is required only in the event of a material change to the facts set forth in the relevant notice filing, as is stated in rule 150.4(c)(4). The Commission understands that the Proposed Rule referred at one point to persons making one filing each year, but this was in the context of estimating how often filings might occur.<sup>194</sup> The Commission did not intend that notices be filed annually in the absence of a material change.

As for the content of the notice filing, rule 150.4(c) includes the same requirements as were in the proposed rule. The Commission has not removed the requirement to provide a description of the relevant circumstances that warrant disaggregation, because it believes that a short description of circumstances helps the Commission and its staff to understand the context of the filing. In this regard, the Commission notes that under the earlier proposed amendment to part 151, the person claiming the exemption would have been required to demonstrate compliance with each condition of relief, which would likely include an organizational chart showing the ownership and control structure of the involved entities, a description of risk management and information-sharing systems, and an explanation of trade data and position information distribution.<sup>195</sup> The Commission has not specifically adopted this guidance for rule 150.4(c). Instead, the Commission notes the distinction between rule 150.4(c)(1)(i), which requires a description of the relevant circumstances that warrant disaggregation to be included in each filing, and rule 150.4(c)(3), which allows the

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<sup>194</sup> See Proposed Rule, 78 FR at 68975.

<sup>195</sup> See Proposed Rule, 78 FR at 68952.

Commission to obtain information demonstrating that the person meets the requirements of the exemption in those cases where the Commission calls for such information.<sup>196</sup>

With regard to signature of the notice and the certification requirement in rule 150.4(c)(1)(ii), the Commission believes that rule 150.4(c) is satisfied when the notice containing the statement required by 150.4(c)(1)(ii) is signed by a senior officer of the entity claiming relief from the aggregation requirement or, if the entity does not have senior officers, a person of equivalent authority and responsibility with respect to the entity.

#### D. Other Issues Related to Aggregation on the Basis of Ownership

The Proposed Rule discussed or requested comment on several other issues related to aggregation due to ownership of another entity, or relief from that requirement. In addition, commenters raised certain miscellaneous issues related to the rule. These issues were the effective date for the final rule, how entities that hold an interest in the entity that submits a notice should be treated (i.e., the treatment of “higher-tier entities”), whether aggregation should be required on a basis pro rata to the ownership interest in the owned entity, and how the aggregation rule would interact with other Commission rules.

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<sup>196</sup> The Commission is adopting a delegation of authority to the Director of the Division of Market Oversight or the Director’s designee to call under rule 150.4(c)(3) for additional information from a person claiming an aggregation exemption. See rule 150.4(e)(1)(ii). This parallels a provision in proposed rule 150.4(e)(1) delegating authority to call for additional information from a person claiming the exemption in proposed rule 150.4(b)(9) (renumbered (b)(8) in the final rule). The subparagraphs in rule 150.4(e)(1) have been renumbered from the proposed rule, because as noted in footnote 77, the Commission is not adopting proposed rule 150.4(e)(1)(i), which contained a delegation of authority referencing proposed rule 150.4(b)(3). Also, the cross-references in rule 150.4(e)(1)(i) have been corrected to refer to paragraph (b)(8)(iv) and paragraph (b)(8).

## 1. Proposed Approach

Regarding the effective date for the final rule, the Commission discussed in the Proposed Rule a potential transition period for application of the requirement of aggregation based on ownership. However, the Commission concluded that this would not be necessary because the Proposed Rule would apply to existing position limits currently in effect and would provide further aggregation exemptions.<sup>197</sup> Therefore, the Proposed Rule did not suggest any compliance period or delayed effectiveness of the final rule.

Regarding the treatment of higher-tier entities, proposed rule 150.4(b)(9)<sup>198</sup> provided that if an owned entity has filed a notice under proposed rule 150.4(c), any person with an ownership or equity interest of 10 percent or greater in the owned entity need not file a separate notice identifying the same positions and accounts previously identified in the notice filing of the owned entity, if such person complies with the conditions applicable to the exemption specified in the owned entity's notice filing, other than the filing requirements; and does not otherwise control trading of the accounts or positions identified in the owned entity's notice. Further, proposed rule 150.4(b)(9) provided that any person relying on the exemption for higher-tier entities must provide to the Commission information concerning the person's claim for exemption called for by the Commission.

In the Proposed Rule, the Commission noted that the proposed approach for higher-tier entities should significantly reduce the filing requirements for aggregation

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<sup>197</sup> See Proposed Rule, 78 FR at 68959.

<sup>198</sup> As noted above, because the Commission is not adopting proposed rule 150.4(b)(3), paragraphs (b)(4) to (b)(9) of proposed rule 150.4 are renumbered in the final rule as paragraphs (b)(3) to (b)(8), respectively. Thus, final rule 150.4(b)(8) corresponds to proposed rule 150.4(b)(9).

exemptions.<sup>199</sup> The proposed approach would allow higher-tier entities to rely upon a notice for exemption filed by the owned entity, and such reliance would only go to the accounts or positions specifically identified in the notice.<sup>200</sup> The proposed approach would also mean that a higher-tier entity that wishes to rely upon an owned entity's exemption notice would be required to comply with conditions of the applicable aggregation exemption other than the notice filing requirements.<sup>201</sup> The Commission did not anticipate that the reduction in filing would impact the Commission's ability to effectively surveil the proper application of exemptions from aggregation. The first filing of an owned entity exemption notice should provide the Commission with sufficient information regarding the appropriateness of the exemption, while repetitive filings of higher-tier entities would not be expected to provide additional substantive information.<sup>202</sup>

Regarding aggregation on a basis that is pro rata to the relevant ownership interest, the Commission preliminarily concluded in the Proposed Rule that a pro rata approach would be administratively burdensome for both owners and the Commission.<sup>203</sup> For example, the Commission suggested that the level of ownership interest in a particular owned entity may change over time for a number of reasons, including stock

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<sup>199</sup> See Proposed Rule, 78 FR at 68975.

<sup>200</sup> For example, if company A had a 30 percent interest in company B, and company B filed an exemption notice for the accounts and positions of company C, then company A could rely upon company B's exemption notice for the accounts and positions of company C. Should company A wish to disaggregate the accounts or positions of company B, company A would have to file a separate notice for an exemption. See Proposed Rule, 78 FR at 68953.

<sup>201</sup> Although higher-tier entities would not have to submit a separate notice to rely upon the notice filed by an owned entity, the Commission noted that it would be able, upon call, to request that a higher-tier entity submit information to the Commission, or allow an on-site visit, demonstrating compliance with the applicable conditions. See *id.*

<sup>202</sup> See *id.*

<sup>203</sup> See Proposed Rule, 78 FR at 68958.

repurchases, stock rights offerings, or mergers and acquisitions, any of which may dilute or concentrate an ownership interest. Thus, it may be burdensome to determine and monitor the appropriate pro rata allocation on a daily basis. Moreover, the Commission stated that it has historically interpreted the statute to require aggregation of all the relevant positions of owned entities, absent an exemption, which is consistent with the view that a holder of a significant ownership interest in another entity may have the ability to influence all the trading decisions of the entity in which such ownership interest is held. However, the Commission asked commenters to address whether the Commission should permit a person to aggregate only a pro rata allocation of the owned entity's positions based on that person's less than 100 percent ownership, including a system for aggregation based on ownership tiers.<sup>204</sup>

The Commission also invited comment on the interplay between the Proposed Rule and other Commission rules. In the Proposed Rule, the Commission asked commenters to address the issues or concerns arising from the Proposed Rule that would have to be addressed if the Commission were to adopt its proposal to establish speculative position limits for other exempt and agricultural commodity futures and option contracts, and physical commodity swaps that are "economically equivalent" to such contracts.<sup>205</sup> The Commission also asked about implications with respect to the interplay between the proposed disaggregation relief and the Commission's other rules relating to swaps.

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<sup>204</sup> See Proposed Rule, 78 FR at 68959.

<sup>205</sup> See Proposed Rule, 78 FR at 68963, referring to Position Limits for Derivatives, 78 FR 75680 (Dec. 12, 2013).

## 2. Commenters' Views

Regarding the effective date for the final rule, several commenters said that the rule should provide for an initial compliance or transition period during which the rule would not be enforced and market participants would be able to adjust their positions to the new aggregation rules.<sup>206</sup> The period of time suggested for this transition ranged from two and one-half months to nine months.<sup>207</sup>

Commenters did not address the terms of proposed rule 150.4(b)(9), relating to higher-tier entities. One commenter said that an entity should be able to file for aggregation relief on behalf of any or all of its affiliates (including joint ventures) as long as the criteria for relief are satisfied for the entities receiving relief.<sup>208</sup>

Regarding aggregation on a basis pro rata to the ownership interest in the owned entity, one commenter thought that the rule should permit entities to aggregate on a basis pro rata to the person's ownership or equity interest, because pro rata aggregation would more accurately reflect the positions owned by market participants and would not unnecessarily restrict the positions of market participants, while reducing the risk of an inadvertent position limits overage.<sup>209</sup> Another commenter supporting pro rata aggregation suggested that the Commission obtain the pro rata percentage that should be attributed to the owner from the owner's filings on Form 40 and the Commission's special call authority.<sup>210</sup> To address potential administrative burdens on the Commission, commenters proposed that entities that apply pro rata aggregation would have to commit

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<sup>206</sup> See CL-ISDA Nov 12; CL-PEGCC Nov 12; CL-FIA Feb 6; CL-Working Group Feb 10; CL-AIMA Feb 10; CL-ICE Nov 13.

<sup>207</sup> See *id.*

<sup>208</sup> See CL-Working Group Nov 13 and CL-Working Group Feb 10. That is, all affiliates, not just higher-tier entities, could rely on a filing made by one entity in an affiliated group.

<sup>209</sup> See CL-FIA Feb 6. See also CL-COPE Feb 10; CL-SIFMA AMG Feb 10.

<sup>210</sup> See CL-MFA Feb 7.

to informing the Commission promptly upon a change in the relevant ownership or equity interest, or upon request by the Commission.<sup>211</sup>

In response to the Commission's request for information on implications with respect to the interplay of the aggregation provisions and other Commission rules, one commenter thought that the full implications of disaggregation relief "will not be readily apparent to physical commodity market participants" until the Commission finalizes the scope of contracts to be included in position limits, especially with regards to trade options, the treatment of which may have a "dramatic impact on whether or not affiliated energy business units ... require disaggregation relief."<sup>212</sup> Further, this commenter said, the manner of organizing physical commodity contracts is likely to be distinct from how financial transactions are organized and executed, and a policy requiring aggregation of both would "create undue hardships" for energy end-users unless there are "accessible, practicable means" of acquiring disaggregation relief.<sup>213</sup>

Another commenter, which is a DCM, sought clarification of how the proposed aggregation requirement would affect the reporting of large trader positions, asserting that reporting firms currently aggregate accounts for reporting purposes by ownership and control so that independently operated subsidiaries of a wholly-owned parent currently report such positions separately in large trader reports and open interest.<sup>214</sup> This commenter believed that if both firms were to aggregate those positions, each could carry large positions on opposite sides of the market but would only report a small aggregate

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<sup>211</sup> See CL-DBCS Feb 10 and CL-Working Group Feb 10, respectively.

<sup>212</sup> See American Gas Association on February 10, 2014 ("CL-AGA Feb 10").

<sup>213</sup> See *id.*

<sup>214</sup> See CL-ICE Feb 10.



position, which could be highly disruptive to the markets.<sup>215</sup> The commenter requested that the Commission make clear that “the current reporting regime would be maintained and not affected by whatever form the final aggregation rule takes.”<sup>216</sup>

This same commenter also requested the Commission to confirm that “an exchange will continue to be permitted to grant separate exemptions to commonly owned affiliates when the affiliates are required to be aggregated,” and that “if firms that are aggregated submit separate Form 204s to the Commission, ... the quantities reported roll up to the aggregate level for position limit purposes.”<sup>217</sup> The commenter noted that it currently permits “commonly owned entities that are under separate decision-making and trading control to transact EFRPs and block trades with each other” and asked the Commission to indicate if these entities would be required to aggregate for position limit purposes, and whether “EFRPs and block trades executed between such firms [are] prohibited trades under the CEA.”<sup>218</sup>

### 3. Final Rule

The final rule will be effective 60 days after publication in the Federal Register. The Commission considered comments requesting an additional compliance or transition period during which the rule would not be enforced and has determined additional time would not be necessary or appropriate for this rule. One effect of the final rule is to provide for certain exemptions from the aggregation requirement. Considering both the relief available under the exemptions and the requirements imposed by the final rule, the

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<sup>215</sup> See *id.* (asserting that lifting one side of a large two-sided spread would result in a big open interest change).

<sup>216</sup> See *id.*

<sup>217</sup> See *id.*

<sup>218</sup> See *id.*

Commission concluded that a period of 60 days would be appropriate to prepare for effectiveness of the final rule.

As for higher-tier entities, the Commission is adopting rule 150.4(b)(8) largely as it was proposed,<sup>219</sup> but with a modification to provide that one entity may file a notice for aggregation relief on behalf of any or all of its affiliates, as long as the criteria for relief are satisfied. The Commission finds merit in a commenter's suggestion that reliance by affiliates on a filing made by one entity in an affiliated group should be permitted for the same reasons that higher-tier entities would be permitted to rely on filings made by subsidiaries. The Commission clarifies that, in order to meet the requirements of rule 150.4(c), a filing made on behalf of affiliates must be signed by a senior officer (or equivalent) of each such affiliate. The Commission intends that filing on behalf of affiliates will be optional; affiliates may also file individual notices.

Regarding aggregation on a pro rata basis, the Commission concludes that although the commenters point out the theoretical merits of a pro rata procedure, none of them explained how pro rata aggregation would be workable in practice. The Commission did not propose adopting pro rata aggregation, because it was concerned about the administrative burdens for both owners and the Commission.<sup>220</sup> After considering the comments received, the Commission has determined not to adopt a pro rata procedure because it remains concerned about the difficulty of specifying a broadly applicable procedure for calculating the level of ownership interests and using those levels to allocate positions to the owner entity. The Commission also finds merit in the

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<sup>219</sup> As noted above, because the Commission is not adopting proposed rule 150.4(b)(3), paragraphs (b)(4) to (b)(9) of proposed rule 150.4 are renumbered in the final rule as paragraphs (b)(3) to (b)(8), respectively. Thus, final rule 150.4(b)(8) corresponds to proposed rule 150.4(b)(9).

<sup>220</sup> See Proposed Rule, 78 FR at 68958.

procedure that has been applied to date (under which owners aggregate all of the relevant positions of the owned entities for which aggregation applies) and concludes that the potential benefits of a pro rata procedure do not support changes in the current practice.

In response to the comments about the interplay of the aggregation provisions and other Commission rules, the Commission clarifies that, generally speaking, the final aggregation rules are intended for purposes of position limits and would not modify practices with respect to other rules. Exchanges will continue to be permitted to require separate reporting by aggregated entities, and to grant separate exemptions to aggregated entities. Also, exchanges will continue to be able to enforce separate limits on entities that are aggregated for federal limits.

E. Exemption for Certain Accounts Held by FCMs in Rule 150.4(b)(3)

1. Proposed Approach

The Commission proposed to move the exemption for certain accounts held by FCMs in existing regulation 150.4(d) to a new proposed rule 150.4(b)(4),<sup>221</sup> so that all aggregation exemptions would be located in paragraph (b) of proposed rule 150.4. The text of proposed rule 150.4(b)(4) was substantially the same as existing regulation 150.4(d), except that it was rephrased in the form of a positive statement of the availability of an exemption from the aggregation requirement, as contrasted to the statement in the existing regulation that the aggregation requirement applies unless certain conditions are met.<sup>222</sup>

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<sup>221</sup> As noted above, because the Commission is not adopting proposed rule 150.4(b)(3), paragraphs (b)(4) to (b)(9) of proposed rule 150.4 are renumbered in the final rule as paragraphs (b)(3) to (b)(8), respectively. Thus, final rule 150.4(b)(3) corresponds to proposed rule 150.4(b)(4).

<sup>222</sup> See Proposed Rule, 78 FR at 68964.

## 2. Commenters' Views and Final Rule

No commenter addressed proposed rule 150.4(b)(4). The Commission is adopting it as proposed, but renumbered as rule 150.4(b)(3).

### F. Exemptions from Aggregation for Underwriting and Broker-Dealer Activities in Rules 150.4(b)(5) and (b)(6)

#### 1. Proposed Approach

Proposed rule 150.4(b)(6)<sup>223</sup> stated that a person need not aggregate the positions or accounts of an owned entity if the ownership or equity interest is based on the ownership of securities constituting the whole or a part of an unsold allotment to or subscription by such person as a participant in the distribution of such securities by the issuer or by or through an underwriter. This proposal was similar to regulation 151.7(g) (in the now-vacated part 151 regulations), which provided for an exemption from aggregation where an ownership interest is in an unsold allotment of securities.

Proposed rule 150.4(b)(7) stated that a broker-dealer registered with the Securities and Exchange Commission,<sup>224</sup> or similarly registered with a foreign regulatory authority, need not aggregate the positions or accounts of an owned entity if the ownership or equity interest is based on the ownership of securities acquired in the normal course of business as a dealer, so long as the broker-dealer does not have actual knowledge of the trading decisions of the owned entity.<sup>225</sup>

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<sup>223</sup> As noted above, because the Commission is not adopting proposed rule 150.4(b)(3), paragraphs (b)(4) to (b)(9) of proposed rule 150.4 are renumbered in the final rule as paragraphs (b)(3) to (b)(8), respectively. Thus, final rule 150.4(b)(5) corresponds to proposed rule 150.4(b)(6).

<sup>224</sup> See 15 U.S.C. 78o. Final rule 150.4(b)(6) corresponds to proposed rule 150.4(b)(7).

<sup>225</sup> As initially proposed, the rule also required that the broker-dealer not have a greater than a 50 percent ownership or equity interest in the owned entity. See Proposed Rule, 78 FR at 68977. In the Supplemental Notice, the Commission proposed to remove this requirement for the reasons supporting removal of the separate conditions for owners of a greater than a 50 percent ownership or equity interest in general. See Supplemental Notice, 80 FR at 58371.

In the Proposed Rule, the Commission noted that the ownership interest of a broker-dealer in an entity based on the ownership of securities acquired as part of reasonable activity in the normal course of business as a dealer is largely consistent with the ownership of an unsold allotment of securities covered by the underwriting exemption in regulation 151.7(g).<sup>226</sup> In both circumstances, the ownership interest is likely not held for investment purposes.<sup>227</sup> Accordingly, the Commission proposed to include an aggregation exemption in proposed rule 150.4(b)(7) for such activity.<sup>228</sup>

## 2. Commenters' Views

Commenters did not address proposed rule 150.4(b)(6).

One commenter said the rationale for the broker-dealer exemption in proposed rule 150.4(b)(7) should be expanded and clarified, asserting that if a broker-dealer acquires a substantial but not controlling interest in a trading entity, its due diligence would reveal historical information while the availability of an exemption appears to be conditioned upon acquiring no further knowledge.<sup>229</sup> The commenter asked that the Commission provide further explanation of what constitutes “actual knowledge,” and in particular whether it is limited to knowledge at the moment of acquisition, or also includes any knowledge of trading decisions by the newly acquired entity and other entities in which the broker-dealer has an equity based interest.<sup>230</sup>

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<sup>226</sup> See Proposed Rule, 78 FR at 68964.

<sup>227</sup> The Commission specifically noted that this proposed exemption would not apply to registered broker-dealers that acquire an ownership interest in securities with the intent to hold for investment purposes. See id.

<sup>228</sup> As proposed, the exemption would encompass a broker-dealer's ownership of securities in anticipation of demand or as part of routine life cycle events, if the activity was in the normal course of the person's business as a broker-dealer. See id.

<sup>229</sup> See CL-IATP Feb 10.

<sup>230</sup> See id.

### 3. Final Rule

The Commission is adopting rule 150.4(b)(6) as it was proposed, but renumbered as rule 150.4(b)(5). For purposes of this rule, the Commission expects to interpret the term “unsold allotment” along the lines that it is interpreted under the Securities Exchange Act of 1934.

The Commission is adopting rule 150.4(b)(7) as it was proposed in the Supplemental Notice, but renumbered as rule 150.4(b)(6). In response to the commenter’s question, the Commission clarifies that it expects traditional standards of a broker-dealer’s due diligence to apply for this provision. As stated in the Proposed Rule,<sup>231</sup> the Commission would interpret the phrase “reasonable activity” to be effectively synonymous with the phrase “normal course of business” in this context.

#### G. Exemption From Aggregation Where Information Sharing Would Violate Law in Rule 150.4(b)(7)

##### 1. Proposed Approach

###### a. In General

The Commission proposed rule 150.4(b)(8)<sup>232</sup> to provide exemptions from aggregation under certain conditions where the sharing of information would cause a violation of state or federal law or the law of a foreign jurisdiction, or regulations adopted thereunder. These exemptions have not previously been available under the Commission’s existing rules. The Commission intended that the proposed rule make clear that the exemption to the aggregation requirement would include circumstances in which the sharing of information would create a “reasonable risk” of a violation – in

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<sup>231</sup> See Proposed Rule, 78 FR at 68964.

<sup>232</sup> As noted above, because the Commission is not adopting proposed rule 150.4(b)(3), paragraphs (b)(4) to (b)(9) of proposed rule 150.4 are renumbered in the final rule as paragraphs (b)(3) to (b)(8), respectively. Thus, final rule 150.4(b)(7) corresponds to proposed rule 150.4(b)(8).

addition to an actual violation – of law or regulations.<sup>233</sup> The Commission noted that whether a reasonable risk exists would depend on the interconnection of the applicable statute and regulatory guidance, as well as the particular facts and circumstances as applied to the statute and guidance.<sup>234</sup> Also, it would not be necessary to show that a comparable federal law exists in order for a state law to be the basis for an exemption.<sup>235</sup>

The Commission stated that the proposed rule was intended to respond to concerns that market participants could face increased liability under state, federal and foreign law. For example, the proposed rule would reduce risk of liability under antitrust or other laws by allowing market participants to avail themselves of the violation of law exemption in those circumstances where the sharing of information created a reasonable risk of violating the above mentioned bodies of law.<sup>236</sup>

b. Laws of Non-U.S. Jurisdictions and International Law

The proposed rule would not allow local law or principles of international law (as opposed to the specific laws of foreign jurisdictions) to be a basis for the exemption. With regard to local law, the Commission stated that an exemption for local law would be difficult to implement due to the number of laws and regulations that would need to be considered and the number of localities that might issue them. While the number of such laws and regulations may be large, the Commission was not persuaded that there would be a significant number of instances where these laws and regulations would prohibit information sharing that would otherwise be permitted under federal and state law.<sup>237</sup>

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<sup>233</sup> See Proposed Rule, 78 FR at 68950.

<sup>234</sup> See Proposed Rule, 78 FR at 68948.

<sup>235</sup> See Proposed Rule, 78 FR at 68950.

<sup>236</sup> See Proposed Rule, 78 FR at 68949.

<sup>237</sup> See Proposed Rule, 78 FR at 68950. In addition, in those instances where local law would impose an information sharing restriction that is not present under state or federal law, the Commission believed that it

Furthermore, the Commission was concerned that reviewing notices of exemptions based on local laws would create a substantial administrative burden for the Commission. That is, balancing the possibility that including local law as a basis for the exemption would be helpful to market participants against the possibility that doing so would lead to confusion or inappropriate results, the Commission concluded that the better course is not to provide for local law to be a basis for the exemption.<sup>238</sup>

With regard to international law, the Commission believed that the sources of international law, such as treaties and international court decisions, would be unlikely to include information sharing prohibitions that would not otherwise apply under foreign or federal law, and that therefore including international law as a basis for the exemption is unnecessary.<sup>239</sup>

c. Memorandum of Law

Under proposed rule 150.4(b)(8), market participants would be required to provide a written memorandum of law (which may be prepared by an employee of the person or its affiliates) which explains the legal basis for determining that information sharing creates a reasonable risk that either person could violate federal, state or foreign law. The Commission explained that requiring a formal opinion of counsel may be expensive and may not provide benefits, in terms of the purposes of this requirement, as compared to a memorandum of law. The memorandum of law would allow Commission staff to review the legal basis for the asserted statutory or regulatory impediment to the sharing of information, and would be particularly helpful where the asserted impediment

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could be inappropriate to favor the local law serving a local purpose to the detriment of the position limits under federal law that serve a national purpose. See id.

<sup>238</sup> See id.

<sup>239</sup> See id.



arises from laws or regulations that the Commission does not directly administer. Further, Commission staff would have the ability to consult with other federal regulators as to the accuracy of the memorandum, and to coordinate the development of rules surrounding information sharing and aggregation across accounts. The Commission stated its expectation that a written memorandum of law would, at a minimum, contain information sufficient to serve these purposes.<sup>240</sup>

The Commission also noted that if there is a reasonable risk that persons in general could violate a provision of federal, state or foreign law of general applicability by sharing information associated with position aggregation, then the written memorandum of law may be prepared in a general manner (i.e., not specifically for the person providing the memorandum) and may be provided by more than one person in satisfaction of the requirement. For example, the Commission noted that trade associations commission law firms to provide memoranda on various legal issues of concern to their members. Under the Proposed Rule, such a memorandum (i.e., one that sets out in detail the basis for concluding that a certain provision of federal, state or foreign law of general applicability creates a reasonable risk of violation arising from information sharing) could be provided by various persons to satisfy the requirement, so long as it is clear from the memorandum how the risk applies to the person providing the memorandum.<sup>241</sup>

On the other hand, the Commission did not believe that simply providing a copy of the law or other legal authority would be sufficient, because this would not set out the basis for a conclusion that the law creates a reasonable risk of violation if the particular

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<sup>240</sup> See *id.*

<sup>241</sup> See *id.*

person providing the document shared information associated with position aggregation. If the effect of the law is clear, the written memorandum of law need not be complex, so long as it explains in detail the effect of the law on the person's information sharing. Also, the question of what legal authorities, in particular, constitute "state law" or "foreign law," where it is relevant, is a question to be addressed in the written memorandum of law. In general, any state-level or foreign legal authority that is binding on the person could be a basis for the exemption.<sup>242</sup>

Proposed rule 150.4(b)(8) also included a parenthetical clause to clarify that the types of information that may be relevant in this regard may include, only by way of example, information reflecting the transactions and positions of a such person and the owned entity. The Commission believed it helpful to clarify in the rule text what types of information may potentially be involved. The mention of transaction and position information as examples of this information was not intended to limit the types of information that may be relevant.<sup>243</sup>

## 2. Commenters' Views

One commenter supported the proposal and said the Commission should include in the final regulatory text or preamble "all elements" of the discussion in the Proposed Rule as to what constitutes a state law, who can prepare the memorandum of law, and what must be included in such memorandum, in order to provide clarity and ensure the process for seeking relief has its intended effects.<sup>244</sup> Another commenter called for the Commission to expand on this provision by granting foreign law-based exemptions on

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<sup>242</sup> See *id.*

<sup>243</sup> See *id.*

<sup>244</sup> See CL-AGA Feb 10.

cross-border compliance, and developing memoranda of understanding with foreign jurisdiction authorities concerning the criteria for substituted compliance for aggregation exemptions.<sup>245</sup>

Other commenters said the Commission should clarify whether the violation of law exemption would be available for other regulations promulgated by the Commission, or for supranational laws, including those promulgated by the European Union.<sup>246</sup> A commenter asked the Commission to clarify whether the memorandum may be prepared by an employee of the firm, or of an affiliate of the firm, that is seeking the exemption.<sup>247</sup>

Another commenter suggested that the rule permit filing of a summary explanation of legal restrictions in lieu of a full legal memorandum (provided the full memorandum is available for inspection by the Commission upon request), to protect privileged attorney-client communications and confidential work-product.<sup>248</sup> On the other hand, a commenter asserted that while a memorandum of law may entail lower costs it would not provide sufficient accountability, in contrast to an opinion of counsel that the commenter believes would be a reliable, thorough, and formal document that provides a distinct level of accountability to the firm making the attestation.<sup>249</sup>

### 3. Final Rule

The Commission is adopting rule 150.4(b)(8) as proposed, but renumbered as rule 150.4(b)(7). The Commission also adopts the statements from the Proposed Rule noted

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<sup>245</sup> See CL-IATP Feb 10.

<sup>246</sup> See CL-Working Group Feb 10 and Alternative Investment Management Association on February 10, 2014 (“CL-AIMA Feb 10”), respectively.

<sup>247</sup> See (CL-AIMA Feb 10).

<sup>248</sup> See CL-FIA Feb 6.

<sup>249</sup> See CL-Better Markets Feb 10 (also arguing that the CEA requires an entity to obtain a legal opinion to avail itself of an aggregation exemption, and it is not within the discretion of the Commission to waive this requirement).

above, including the statements as to what constitutes a state law, who can prepare the memorandum of law, and what must be included in such memorandum.<sup>250</sup>

In response to comments, the Commission clarifies that supranational laws (such as EU laws) constitute laws of a foreign jurisdiction which may be a basis for the exemption, if they meet the standard of being the basis for a reasonable risk of violation arising from information sharing. Similarly, the Commission's own regulations may be a basis for the exemption if they meet that standard.

Also, the Commission clarifies that the memorandum of law supporting an exemption may be prepared by an employee of the firm, or of an affiliate of the firm, that is seeking the exemption. However, the Commission does not agree with the commenters who suggested that a more summary document may support an exemption, or that a formal opinion of counsel should be required. Instead, the Commission continues to believe that, as stated in the Proposed Rule,<sup>251</sup> requiring a formal opinion of counsel would be expensive and may not provide benefits, in terms of the purposes of this requirement, as compared to a memorandum of law. The Commission expects that a memorandum of law submitted in support of an exemption will contain information sufficient to allow Commission staff to review the legal basis for the asserted statutory or regulatory impediment to the sharing of information (particularly where the asserted impediment arises from laws or regulations that the Commission does not directly administer), to consult with other federal regulators as to the accuracy of the memorandum, and to coordinate the development of rules surrounding information sharing and aggregation across accounts.

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<sup>250</sup> See Proposed Rule, 78 FR at 68950.

<sup>251</sup> See *id.*

H. Aggregation Requirement for Substantially Identical Trading in Rule 150.4(a)(2)

1. Proposed Approach

The Commission first adopted an aggregation requirement for substantially identical trading in the part 151 rules in order to prevent circumvention of the aggregation requirements.<sup>252</sup> In adopting this proposal, the Commission explained that “In [the] absence of such aggregation requirement, a trader can, for example, acquire a large long-only position in a given commodity through positions in multiple pools, without exceeding the applicable position limits.”<sup>253</sup> The Commission further explained that under this provision, no ownership threshold would apply and positions of any size in accounts or pools would require aggregation.<sup>254</sup>

The Proposed Rule, adopted after the part 151 rules were vacated, included a similar provision in proposed rule 150.4(a)(2), noting that the proposed rule was intended to be consistent with the approach taken in vacated rule 151.7(d).<sup>255</sup>

2. Commenters’ Views

A commenter representing managers of registered investment companies said aggregation should not be required where a common investment adviser controls the activities of various registered investment companies, so long as the investment companies have different investment strategies, because restructuring of the advisory

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<sup>252</sup> See Position Limits for Futures and Swaps, 76 FR 71626, 71654 (Nov. 18, 2011). The provision was adopted as rule 151.7(d) (since vacated).

<sup>253</sup> Id.

<sup>254</sup> See id.

<sup>255</sup> See Proposed Rule, 78 FR at 68951 n 39.

business to obtain an exemption from aggregation would impose costs on the shareholders in the investment companies.<sup>256</sup>

Another commenter representing investment managers asked the Commission to provide further guidance on the situations that will be covered by the “substantially identical trading strategies” provision, including whether the Commission may apply the provision to situations other than passively managed index funds.<sup>257</sup> This commenter believed that the aggregation requirement should not apply to accounts placed in “separate performance composites,” and suggested that the Commission consider using in this rule the term “trading program” as defined in rule 4.10(g), rather than the term “trading strategies,” which is not defined.<sup>258</sup> A third commenter representing investment managers suggested that the Commission remove from the rule any requirement that a person holding or controlling the trading of positions in accounts or pools with substantially identical trading strategies aggregate those positions.<sup>259</sup>

Two commenters asserted that the Commission did not provide a statutory or policy rationale for, or consider the costs and benefits of, this requirement, or provide guidance regarding the meaning of “substantially identical trading strategies.”<sup>260</sup> Both of

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<sup>256</sup> See Investment Company Institute on February 10, 2014 (“CL-ICI Feb 10”) (asserting that investment strategies that do not necessarily dictate the same specific trades should not be considered “substantially identical,” noting that registered investment companies may be managed by unaffiliated advisors that follow similar strategies disclosed in their prospectuses).

<sup>257</sup> See CL-AIMA Feb 10. Passively managed index funds were cited as an example of pools with identical trading strategies in the adoption of rule 151.7(d). See Position Limits for Futures and Swaps, 76 FR at 71654.

A commenter representing managers of pension plans asked for guidance on how to determine if two investment vehicles in which an investor holds an interest are pursuing “substantially identical trading strategies.” See American Benefits Council, Inc. on February 10, 2014 (“CL-ABC Feb 10”).

<sup>258</sup> See CL-AIMA Feb 10.

<sup>259</sup> See CL-SIFMA AMG Feb 10.

<sup>260</sup> See CL-SIFMA AMG Feb 10 and CL-CME Feb 10. As an alternative, one of these commenters suggested that the requirement be limited to persons that directly control the trading of positions in substantially identical accounts or pools. See CL-SIFMA AMG Feb 10.

these commenters asserted that the proposed rule would result in an absurd consequence requiring a person to aggregate all of the positions of two single-commodity index funds using the same index in which the person invested, or in which a fund-of-funds manager invested for that person.<sup>261</sup>

On the other hand, a commenter argued that the Commission's position limit aggregation regime should limit financial speculation by any group or class of traders in a given contract that becomes large enough to threaten the contract's ability to serve the needs of hedgers.<sup>262</sup> This commenter asserted that commodity index traders, which the commenter believes trade en masse with respect to an explicit programmed common strategy, are clearly covered by the statutory provision on "two or more persons acting pursuant to an expressed or implied agreement or understanding" and these traders must be aggregated for position limit purposes.<sup>263</sup> Another commenter endorsed the view that commodity index traders' positions should be aggregated because they "operate outside of the normal operation of the commodity markets [and] sway market prices due to sheer volume and for exogenous, non-market reasons," so that aggregating their positions would significantly reduce market speculation and facilitate predictable commodities market operations.<sup>264</sup>

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<sup>261</sup> See CL-SIFMA AMG Feb 10 and CL-CME Feb 10. One commenter provided an example of its reading of the requirement, asserting that "a \$10,000 investor in two \$1 billion commodity index mutual funds using the same index may have to aggregate the positions in those two \$1 billion mutual funds" because the funds follow substantially identical trading strategies. See CL-SIFMA AMG Feb 10. This commenter posited that the investor would have to implement a compliance program to prevent inadvertent violations of the position limits rules, which (in addition to imposing significant legal and operational obstacles) would impose costs many times the investor's \$10,000 investment. See *id.*

<sup>262</sup> See CL-Better Markets Feb 10 and Better Markets, Inc. on March 30, 2015 ("CL-Better Markets Mar 30").

<sup>263</sup> See CL- Better Markets Mar 30 (arguing that Congress did not permit the discretion of the Commission to apply position limits to allow for an "abdication of responsibility" to act with respect to commodity index traders).

<sup>264</sup> See CL-Occupy the SEC Aug 7.

### 3. Final Rule

The Commission is adopting rule 150.4(a)(2) substantially as it was proposed, but with clarifying changes discussed below. The Commission continues to believe that this provision is necessary to prevent circumvention of the aggregation requirements. In this regard, the Commission notes, for example, that the exemption in rule 150.4(b)(1) will generally permit limited partners, limited members, shareholders and other similar types of pool participants not to aggregate the accounts or positions of the pool with any other accounts or positions such person is required to aggregate, unless certain circumstances specified in rule 150.4(b)(1) are present.<sup>265</sup> As a result of this exemption, a person could hold significant positions in multiple pools without any aggregation requirement, which the Commission believes to be acceptable so long as the pools do not have substantially identical trading strategies. However, in the absence of rule 150.4(a)(2) the exemption would also permit a trader to separate a large position in a given commodity derivative into positions held in pools that have substantially identical trading strategies (i.e., the example cited in the adoption of vacated regulation 151.7(d)). To ensure that this situation is covered by the aggregation requirement, rule 150.4(a)(2) requires that trader to aggregate its positions in all pools or accounts that have substantially identical trading strategies.

Also, even apart from the exemption in rule 150.4(b)(1), a person would (in the absence of rule 150.4(a)(2)) generally not be required to aggregate positions in accounts or pools if those positions are below the 10 percent threshold in rule 150.4(a)(1) and no control is present. For this reason, and as was the case in vacated regulation 151.7(d),

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<sup>265</sup> See generally the discussion of rule 150.4(b)(1) in part II.0, below.



there is no ownership threshold in rule 150.4(a)(2), so that if the accounts or pools have substantially identical trading strategies, a person must aggregate its positions in the accounts or pools regardless of ownership level. Also, as was proposed, aggregation under rule 150.4(a)(2) is not subject to the exemptions in rule 150.4(b).<sup>266</sup> And, as is stated in the rule, aggregation under rule 150.4(a)(2) is required if a person either holds positions in more than one account or pool with substantially identical trading strategies, or controls the trading of such positions without directly holding them.

In response to the commenters, the Commission disagrees that this provision could lead to absurd results. In the example described by one commenter, where a person has holdings of \$10,000 each in two commodity index funds with substantially identical strategies,<sup>267</sup> the terms of the rule require the owner to aggregate the positions that it (i.e., the owner) holds in the two commodity index mutual funds, not the positions of the funds themselves. That is, the two holdings would be aggregated into one \$20,000 holding.<sup>268</sup> The owner is not required to aggregate all the positions held by the two funds. Effectively, it is the person's pro rata interest (held or controlled) in each account or pool with substantially identical trading strategies that must be included in the aggregation.

The Commission also believes that proposed rule 150.4(a)(2) was slightly unclear when it stated that the person "must aggregate such positions" without stating precisely with what such positions must be aggregated. To clarify how aggregation under rule 150.4(a)(2) is to be effected, the Commission has modified the last clause of the rule so

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<sup>266</sup> See Proposed Rule, 78 FR at 68959 n 109.

<sup>267</sup> See footnote 261.

<sup>268</sup> The commenter described the holdings in dollar amounts. See CL-SIFMA AMG Feb 10. The Commission notes however that the position limits generally are stated in terms of a number of contracts, not a dollar amount. To apply rule 150.4(a)(2), a person holding or controlling the trading of positions in more than one account or pool with substantially identical trading strategies must determine the person's pro rata interest in the number of contracts such accounts or pools are holding.

that it reads “...must aggregate each such position (determined pro rata) with all other positions held and trading done by such person and the positions in accounts which the person must aggregate pursuant to paragraph (a)(1) of this section.” That is, rules 150.4(a)(1) and (a)(2) are to be applied cumulatively, so that a person must aggregate all positions held and trading done by such person with all positions that must be aggregated pursuant to rule 150.4(a)(1) and all positions that must be aggregated pursuant to rule 150.4(a)(2).

I. Exemption for Ownership by Limited Partners, Shareholders or Other Pool Participants in Rule 150.4(b)(1)

1. Proposed Approach

Proposed rule 150.4(b)(1) was substantially similar to existing regulation 150.4(c). The Commission proposed rule 150.4(b)(1) as part of an organizational revision intended to make rule 150.4 easy to understand and apply. In the Proposed Rule, the Commission explained that stating this provision as the first exemption will clarify that this exemption may be applied by any person that is a limited partner, limited member, shareholder or other similar type of pool participant holding positions in which the person, by power of attorney or otherwise, directly or indirectly, has a 10 percent or greater ownership or equity interest in a pooled account or positions.<sup>269</sup> That is, if the requirements of this exemption are satisfied with respect to a person, then the person need not determine if the requirements of the exemption in paragraph (b)(2) are satisfied. The text of paragraph (b)(2), in turn, states that it applies to persons with an ownership or equity interest in an owned entity, other than an interest in a pooled account which is subject to paragraph (b)(1).

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<sup>269</sup> See Proposed Rule, 78 FR at 68963.

Proposed rule 150.4(b)(1) stated that for any person that is a limited partner, limited member, shareholder or other similar type of pool participant holding positions in which the person, by power of attorney or otherwise, directly or indirectly, has a 10 percent or greater ownership or equity interest in a pooled account or positions, aggregation of the accounts or positions of the pool is not required, except as provided in paragraphs (b)(1)(i), (b)(1)(ii) or (b)(1)(iii). Although existing regulation 150.4(c) does not contain any explicit statement of this rule, the lack of an aggregation requirement in these circumstances is implicit in the existing regulation's statement that aggregation is required only in certain specified circumstances. Thus, proposed rule 150.4(b)(1)(i) stated explicitly a principle that is implicit in the existing regulation.<sup>270</sup> Paragraphs (b)(1)(i), (b)(1)(ii) and (b)(1)(iii) of proposed rule 150.4 set out the circumstances in which aggregation requirements apply; these circumstances are substantially similar to those covered by paragraphs (c)(1), (c)(2) and (c)(3) of existing regulation 150.4, but the text of the rule was modified to simplify the wording of the provisions.

The Proposed Rule also briefly addressed the treatment of 4.13 pools in a manner that is equivalent to the treatment of operating companies.<sup>271</sup> The Commission noted that the proposed amendment to the later-vacated part 151 regulations had proposed to expand the definition of independent account controller to include the managing member of a

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<sup>270</sup> The Commission stated that this modification was not intended to effect a substantive change. Rather, it is intended to state explicitly a rule that the Commission has applied since at least 1979. See footnote 99, above.

<sup>271</sup> A "4.13 pool" is a commodity pool for which the relevant CPO has claimed an exemption from registration under regulation 4.13. A commenter on the proposed amendments to part 151 had addressed 4.13 pools more broadly, and said that the Commission's rules should treat ownership of 4.13 pools in the same way that the rules treat ownership of operating companies. In particular, this commenter said that the Commission should eliminate the requirement that the positions of a 4.13 pool be aggregated with the positions of any person that owns more than 25 percent of the 4.13 pool. See Proposed Rule, 78 FR at 68965.

limited liability company, and to amend the definitions of eligible entity and independent account controller to specifically provide for 4.13 pools established as limited liability companies.<sup>272</sup> In the Proposed Rule, the Commission stated that this is a matter that could be the subject of relief granted under CEA section 4a(a)(7) and that persons wishing to seek such relief should apply to the Commission stating the particular facts and circumstances that justify the relief.<sup>273</sup>

## 2. Commenters' Views

Commenters did not address the proposed reorganization and rephrasing of proposed rule 150.4(b)(1). However, some commenters addressed the substance of the rule, which is the same as existing regulation 150.4(c).

One commenter asked that the Commission make the following technical changes to the proposed rule: expand the exemption in the rule to include the beneficiary of a trust, clarify that a “limited member” of a limited liability company is any person who is not a managing member, construe the term CPO to include a person discharging the function of CPO (to account for situations where the function has been delegated from one person to another), and confirm that a filing generally is not required for relief under 150.4(b)(1), with the exception of relief under rule 150.4(b)(1)(ii).<sup>274</sup>

Several commenters said the Commission should provide an ownership exemption for interests held by a limited partner in a commodity pool – i.e., the rule should permit disaggregation on a showing that the limited partner does not control

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<sup>272</sup> See *id.*

<sup>273</sup> See *id.*

<sup>274</sup> See CL-AIMA Feb 10.

trading by the commodity pool (for which the CPO is exempt from registration).<sup>275</sup> That is, these commenters believed that the rule requiring aggregation when a limited partner owns more than 25 percent of a pool (i.e., existing regulation 150.4(c)(3)) should be modified to allow for disaggregation following a filing attesting to no control by the limited partner.<sup>276</sup>

One of these commenters asserted that investors holding greater than 25 percent ownership interests in pools often do not have control of the pools' trading (or ability to monitor the pools' positions) and thus would qualify for disaggregation under the criteria in proposed rule 150.4(b)(2)(i).<sup>277</sup> This commenter cited a no-action letter issued by the staff of the Commission, which the commenter interpreted to acknowledge that, in the case of a manager of a fund of funds, there may be a "lack of visibility... regarding the positions of an Investee Fund," that "such opaqueness" may not allow the manager to have adequate data to determine a position, and when investment managers of underlying investee funds provide full position data, such data is rarely made available on a real-time basis.<sup>278</sup>

A commenter representing managers of pension fund investments believed that it is unclear whether proposed rule 150.4(b)(1)(iii) was meant to require a passive investor

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<sup>275</sup> See CL-OTPP Nov 13; CL-PEGCC Nov 12; CL-DBCS Feb 10; CL-SIFMA AMG Nov 13; CL-MFA Nov 12; CL-MFA Feb 7.

<sup>276</sup> See *id.*

<sup>277</sup> The commenter believes that while the requirement to aggregate for pools run by exempt CPOs was adopted in 1999 when very few CPOs were exempt and there was a concern about small pools, this requirement is no longer appropriate given the expanded number of exempt CPOs. See CL-MFA Nov 12 and CL-MFA Feb 7.

Another commenter said that passive investors in 4.13 pools should not be required to aggregate, and they should not have to make a filing with the Commission as a condition of such disaggregation, so that they would be treated the same as unaffiliated passive investors in non-exempt pools under rule 150.4(b)(1). See CL-SIFMA AMG Nov 13 and CL-SIFMA AMG Feb 10.

<sup>278</sup> See CL-MFA Feb 7, citing CFTC No-Action Letter No. 12-38 (Nov 29, 2012).

that holds a 25 percent or greater ownership interest in a 4.13 pool to aggregate the pool's positions.<sup>279</sup> The commenter felt that the Commission had not provided any rationale for, or evaluated the costs of, such a requirement, with which compliance would be impractical, if not impossible.<sup>280</sup>

### 3. Final Rule

The Commission is adopting rule 150.4(b)(1) as it was proposed. In response to a commenter, the Commission notes that rule 150.4(c), as was the case for the proposed rule, requires a filing to claim an aggregation exemption under paragraph (b)(1)(ii), but not the other subparagraphs of paragraph (b)(1).

The commenters' other discussion of this rule goes beyond the scope of the proposal, because no substantive changes to the rule were proposed. Rather, this rule was included in the proposal as part of the reorganization of rule 150.4.

The question in the proposal about treating 4.13 pools the same as operating companies was accompanied by a statement that "this is a matter that could be the subject of relief granted under CEA section 4a(a)(7)." That is, this question requested comment on the circumstances that could justify relief that may be granted in the future under CEA section 4a(a)(7).

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<sup>279</sup> See CL-ABC Feb 10.

<sup>280</sup> The commenter asserted that managers of 4.13 pools will be reluctant to provide such information because (i) the selective disclosure of fund position information to only certain investors could raise legal liability issues under the federal securities laws; (ii) certain employee benefit plans could utilize position information provided by the fund to deduce proprietary and confidential investment strategies of the advisor/manager to such funds; and (iii) the operational burdens associated with the fund providing such information to certain employee benefit plans, to the extent not legally prohibited, may be deemed too costly. See *id.*

J. Exemption for Accounts Carried by an Independent Account Controller in Rule 150.4(b)(4) and Conforming Change in Rule 150.1

1. Proposed Approach

The Commission proposed rule 150.4(b)(5) to take the place of the existing IAC provision in existing regulation 150.3(a)(4) (which was proposed to be deleted).<sup>281</sup> The Commission also proposed conforming changes to the definition of the term “eligible entity” in proposed rule 150.1(d) and (e). Existing regulation 150.3(a)(4) provides an eligible entity with an exemption from aggregation of the eligible entity’s customer accounts that are managed and controlled by IACs.<sup>282</sup> The Commission stated that the reason for this organizational change was to place the IAC exemption in the regulatory section providing for aggregation of positions.<sup>283</sup> Proposed rule 150.4(b)(5) was substantially similar to existing regulation 150.3(a)(4) except that the Commission proposed to modify it (and the related definition in proposed rule 150.1(d)) so that it could be applied with respect to any person with a role equivalent to a general partner in a limited liability partnership or a managing member of a limited liability company.<sup>284</sup>

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<sup>281</sup> See Proposed Rule, 78 FR at 68965. As noted above, because the Commission is not adopting proposed rule 150.4(b)(3), paragraphs (b)(4) to (b)(9) of proposed rule 150.4 are renumbered in the final rule as paragraphs (b)(3) to (b)(8), respectively. Thus, final rule 150.4(b)(4) corresponds to proposed rule 150.4(b)(5).

<sup>282</sup> The definition of eligible entity in existing regulation 150.1(d) includes the limited partner or shareholder in a commodity pool the operator of which is exempt from registration under § 4.13. However, with regard to a CPO that is exempt under regulation 4.13, the definition of an independent account controller in existing regulation 150.1(e)(5) only extends to a general partner of a commodity pool the operator of which is exempt from registration under § 4.13. At the time the Commission expanded the IAC exemption to include regulation 4.13 commodity pools, market participants generally structured such pools as limited partnerships. See Proposed Rule, 78 FR at 68964.

<sup>283</sup> See Proposed Rule, 78 FR at 68965.

<sup>284</sup> A commenter on the proposed amendments to part 151 had suggested that this rule be expanded to apply to any person with a role equivalent to a general partner in a limited partnership or managing member of a limited liability company, to accommodate various structures that are used for commodity pools in jurisdictions outside the U.S. See *id.*

## 2. Commenters Views'

Commenters did not address the proposed reorganization and rephrasing of proposed rule 150.4(b)(5). However, some commenters addressed the substance of the rule, which is the same as existing regulation 150.3(a)(4).

Several commenters asked that the Commission expand the definition of the term “eligible entity” to include a variety of different entities, such as:

- the operators of certain similar investment vehicles, such as governmental or pension-sponsored investment management vehicles;<sup>285</sup>
- non-corporate entities that sponsor plans, such as governmental plans or church plans;<sup>286</sup>
- foreign entities that perform a similar role or function subject to foreign regulation;<sup>287</sup>
- exempt CTAs, and all registered, exempt or excluded CPOs;<sup>288</sup>
- a CPO exempt from registration; all operators excluded from the definition of CPO; a limited partner, a limited member, shareholder or other pool participant of a pool whose operator is either registered or exempt from registration; a CTA that is exempt from registration; a person excluded from the definition of CTA; and a general partner, managing member or

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<sup>285</sup> See CL-OTPP Nov 13.

<sup>286</sup> This commenter said that the phrase “commodity pool the operator of which is excluded from registration” should be deleted from proposed rule 150.1(e)(5)(ii) and replaced by the following text from proposed rule 150.1(d): “trading vehicle which is excluded, or which itself has qualified for exclusion from the definition of the term ‘pool’ or ‘commodity pool operator,’ respectively.” See CL-AIMA Feb 10.

<sup>287</sup> This commenter said that disaggregation relief should be available to an affiliate which operates as a Registered Fund Management Company in Singapore managing non-U.S. client accounts holding U.S. futures, options and swaps and, thus, is not subject to U.S. registration requirements. See Olam International Limited on February 10, 2014.

<sup>288</sup> See CL-AIMA Feb 10 and CL-ICI Feb 10.



manager of a commodity pool whose operator is either registered, exempt from registration, or excluded from the definition of CPO.<sup>289</sup>

Two commenters suggested that the definition of the term “eligible affiliate” should include sister companies, consistent with the definition of the term “eligible affiliate counterparty” under existing regulation 50.52, because the proposed definition does not appear to cover sister affiliates in a corporate group where neither affiliate holds an ownership interest in the other.<sup>290</sup> Another two commenters suggested the deletion of the proposed filing requirement for the IAC exemption in proposed rule 150.4(c)(1), because, they argued, no filing has been necessary to rely on the IAC exemption, and the Proposed Rule provides no justification for deviating from this established practice.<sup>291</sup>

Last, a commenter argued that the Commission provided no rationale for the proposed amendments to the IAC exemption, and asserted that since at least 1999 the IAC exemption is not limited to “customer” positions traded by IACs but rather is available to limited partners who may be affiliates or principals of an owned-CPO.<sup>292</sup>

### 3. Final Rule

The Commission is adopting rules 150.1(d) and (e) and rule 150.4(b)(5) as they were proposed, but proposed rule 150.4(b)(5) is renumbered as 150.4(b)(4).<sup>293</sup> Regarding the comments that the term “eligible entity” should include entities such as the operators

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<sup>289</sup> See CL-MFA Nov 12.

<sup>290</sup> See CL-FIA Feb 6 and Commercial Energy Working Group on March 30, 2015.

<sup>291</sup> See CL-ABC Feb 10 and CL-SIFMA AMG Nov 13.

<sup>292</sup> See CL-CME Feb 10.

<sup>293</sup> Rule 150.1(e)(2), as adopted, reflects two grammatical corrections: the phrase “fiduciary responsibilities to the managed positions and accounts” is corrected to read “fiduciary responsibilities for managed positions and accounts” and the word “is” is added before the second usage of the word “consistent.”

Rule 150.4(b)(4)(i)(A), as adopted, reflects the deletion of the phrase “document routing and other procedures or” for consistency with rule 150.4(b)(2)(i)(C). See footnote 164, above.

of governmental or church plans, the Commission notes that rule 150.1(d) defines the term to include the operator of a trading vehicle which is excluded, or which itself has qualified for exclusion from the definition of the term “pool” or “commodity pool operator,” respectively, under § 4.5, and existing regulation 4.5 has exclusions from the definition of “pool” for governmental plans and church plans.<sup>294</sup> Thus, operators of such trading vehicles would be eligible entities.

The commenters’ discussion of proposed rule 150.4(b)(5) (final rule (150.4(b)(4)) goes beyond the scope of the proposal. As proposed, this paragraph replaced the existing IAC rule in existing regulation 150.3(a)(4), except that it was expanded to include any person with a role equivalent to a general partner in an limited partnership or managing member of a limited liability company. The Commission did not propose any other changes to the definitions of eligible entity or IAC. Other changes to this regulation would be a matter for future consideration.<sup>295</sup>

The Commission believes that the existing IAC exemption, the substance of which is included in the final rule, is consistent with the CEA and prior Commission precedents. In this regard, it is important to distinguish between the exemption in existing regulation 150.4(c)(2) (e.g., for a limited partner of a CPO who is also a principal or affiliate of the CPO) and the IAC exemption in existing regulation 150.3(a)(4). These two distinct exemptions are incorporated into the final rule as rules 150.4(b)(1)(ii) and (b)(4), respectively. Thus, the comment implying that Commission

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<sup>294</sup> See existing regulations 4.5(a)(4)(iii) and 4.5(a)(4)(v), respectively.

<sup>295</sup> The Commission notes that commenters have suggested that registered CPOs and exempt CTAs should be included in the definition of the term “eligible entity” and the definition should clarify the treatment of certain persons who are exempt from registration as CPOs. The Commission is considering these comments and may take them up in a later proceeding.

precedent has not limited the IAC exemption to “customer” positions traded by IACs is misplaced. The discussion cited by the commenter related to the definitions of the terms “eligible entity” and “IAC” and was codified in existing regulation 150.4(c)(2); this precedent did not relate to the exemption language in existing regulation 150.3(a)(4).<sup>296</sup>

Regarding the potential for aggregation between “sister affiliates” where neither affiliate holds an ownership interest in the other, the Commission notes that an entity generally would not require relief in this situation because aggregation is required only when one entity owns an interest in, or controls, the other. Last, the definition of the term “eligible affiliate” is not part of the Proposed Rule and so comments on this definition are not germane to this rulemaking.

#### K. Revisions to Clarify Regulations

##### 1. Proposed Approach

In connection with the proposed modifications to rule 150.4, the Commission reviewed whether the text of existing regulation 150.4 is easy to understand and apply. In this regard, the Commission noted that the existing regulation may be unclear, especially in terms of the relationship between the provisions of paragraphs (a) through (d) of the existing regulation and whether a particular paragraph is an exception to another.<sup>297</sup> Also, as more market participants active in different parts of the market have studied existing regulation 150.4, both in connection with the Dodd-Frank Act and otherwise, questions have arisen about the application of the aggregation requirements to a wide variety of circumstances. The Commission believed it is important that the rules setting forth the aggregation requirements be clear in their application to both the

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<sup>296</sup> See 1999 Amendments, 64 FR 24038 at 24045.

<sup>297</sup> See Proposed Rule, 78 FR at 68953.

circumstances in which they currently apply, and the various circumstances in which they may apply in the future. The textual modifications in the proposed rule were not intended to effect any substantive change to the meaning of rule 150.4.<sup>298</sup>

Therefore, the Commission proposed to modify the text to clarify that paragraph (a) of rule 150.4 states the general requirement to aggregate positions a person may hold in various accounts, and paragraph (b) of the rule sets out the exemptions to the aggregation requirement that may apply. The Commission believed that this format clarifies that the exemptions in rule 150.4(b) are alternatives; that is, aggregation is not required to the extent that any of the exemptions in rule 150.4(b) may apply.<sup>299</sup>

Proposed rule 150.4(b)(1) stated that for any person that is a limited partner, limited member, shareholder or other similar type of pool participant holding positions in which the person by power of attorney or otherwise directly or indirectly has a 10 percent or greater ownership or equity interest in a pooled account or positions, aggregation of the accounts or positions of the pool is not required, except as provided in paragraphs (b)(1)(i), (b)(1)(ii) or (b)(1)(iii). Proposed rule 150.4(b)(2) and proposed rule 150.4(b)(3) set out exemptions permitting disaggregation of the positions of owned entities in certain circumstances.

Paragraphs (b)(4) to (b)(8) of proposed rule 150.4 (renumbered as paragraphs (b)(3) to (b)(7) of the final rule) set forth other exemptions that may apply in various circumstances. The exemption for certain accounts held by FCMs in paragraph (b)(4) of

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<sup>298</sup> See id. The textual modifications in the Proposed Rule related to the Commission regulations currently in effect. The Commission noted that its proposal regarding position limits includes amendments to the text of certain Commission regulations (See Position Limits for Derivatives, 78 FR 75680 (Dec. 12, 2013)) and that if the later proposal is adopted, conforming technical changes to reflect the interplay between the two amendments may be necessary.

<sup>299</sup> See Proposed Rule, 78 FR at 68963.

the proposed rule (final rule (b)(3)) was substantially the same as existing regulation 150.4(d), except that it was rephrased in a form of a statement of when an exemption is available, instead of the statement in the existing regulation that the aggregation requirement applies unless certain conditions are met. Paragraph (b)(5) of the proposed rule (final rule (b)(4)) set forth the exemption for accounts carried by an IAC that was substantially similar to existing regulation 150.3(a)(4). Paragraphs (b)(6), (b)(7) and (b)(8) of the proposed rule (final rule paragraphs (b)(5), (b)(6) and (b)(7), respectively) set forth the exemptions for underwriting, broker-dealer activity and circumstances where laws restrict information sharing. Paragraph (b)(9) of the proposed rule (final rule (b)(8)) described how higher-tier entities may apply an exemption pursuant to a notice filed by an owned entity.

## 2. Commenters' Views and Final Rule

No commenters raised any problems or issues arising from these organizational changes, so they are reflected in the final rule adopted by the Commission.

Finally, it should be noted that the amendments to part 150 adopted here may require further conforming technical changes if the Commission adopts any proposed amendments to its regulations regarding position limits.<sup>300</sup> Such changes would be explained at the time they are adopted.

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<sup>300</sup> See Position Limits for Derivatives, 78 FR 75680 (December 12, 2013).

### **III. Related Matters**

#### **A. Considerations of Costs and Benefits**

Section 15(a) of the CEA<sup>301</sup> requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

As discussed in Section I (Background), above, the Commission proposed amendments to its existing aggregation rules.<sup>302</sup> In November 2013, the Commission proposed amendments to existing regulations 150.1 and 150.4.<sup>303</sup> In response to commenters, the Commission issued a supplemental notice in September 2015 to modify one of the proposed exemptions to the Commission's proposed aggregation requirement.<sup>304</sup> The modification changed the exemption category that was tied to ownership and equity levels. In the main, the Commission is adopting all of the changes identified in the Proposed Rule, as modified by the Supplemental Notice. The Commission believes that the final rules are a reasoned approach to complying with CEA section 4a(a)(1)'s aggregation requirement. The Commission also believes that the final

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<sup>301</sup> 7 U.S.C. 19(a).

<sup>302</sup> 17 CFR part 150.

<sup>303</sup> 17 CFR 150.1 and 150.4. See Aggregation of Positions; Proposed Rule, 78 FR 68946 (Nov. 15, 2013) ("Proposed Rule").

<sup>304</sup> See Aggregation of Positions: Supplemental notice of proposed rulemaking, 80 FR 58365 (Sept. 29, 2015) ("Supplemental Notice").

rules, via exemptions, give market participants opportunities and processes to reduce costs and burdens associated with aggregating positions that might hinder trading or reduce liquidity.

Current part 150 is the baseline against which the costs and benefits associated with these final rules will be identified and considered.<sup>305</sup> The current regulations in part 150 require certain market participants to aggregate positions subject to the position limits.<sup>306</sup> As discussed above in Section II., the Commission's aggregation policy under existing regulation 150.4 generally requires that unless a particular exemption applies, a person must aggregate all positions and accounts for which that person controls the trading decisions with all positions and accounts in which that person has a 10 percent or greater ownership interest, and with the positions of any other persons with whom the person is acting pursuant to an express or implied agreement or understanding.<sup>307</sup> There are several exemptions from aggregation listed, such as the ownership interests of limited partners in pooled accounts,<sup>308</sup> discretionary accounts and customer trading programs of FCMs,<sup>309</sup> and eligible entities with IAC that manage customer positions.<sup>310</sup>

In the Proposed Rule and the Supplemental Notice, the Commission also requested comments on its costs-and-benefits assessments and sought data as well as other information in the estimation of quantifiable costs and benefits of the final changes to part 150.<sup>311</sup> The commenters addressed the cost-and-benefit aspect of the Proposed

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<sup>305</sup> 17 CFR part 150.

<sup>306</sup> See Proposed Rule, 78 FR at 68946; Supplemental Notice, 80 FR at 58374 (for a discussion of the baseline).

<sup>307</sup> See 17 CFR 150.4(a) and (b).

<sup>308</sup> See 17 CFR 150.4(c).

<sup>309</sup> See 17 CFR 150.4(d).

<sup>310</sup> See 17 CFR 150.3(a)(4).

<sup>311</sup> See Proposed Rule, 78 FR at 68972, and Supplemental Notice, 80 FR at 58375.

Rule and the Supplemental Notice in a general manner; commenters did not provide data.<sup>312</sup> Accordingly, since the data requisite to quantification is by-and-large proprietary, specific to individual market participants, and not otherwise reasonably accessible to the Commission, the Commission's cost-and-benefit discussion that follows is largely qualitative in nature. The Commission, nevertheless, attempts to quantify costs and benefits where possible, especially, in the area of market participants' filing exemption notices.

#### 1. Final Rules – Summary

The Commission is adopting final rules that, primarily, have two objectives. First, the final rules state the Commission's aggregation requirement. Second, the final rules identify exemptions that relieve market participants from the requirement to aggregate all held positions that are subject the Commission's position limits.

Final rules 150.4(a)(1) and (a)(2) set out two aggregation requirements: (1) an aggregation requirement for a person exercising trading control or possessing certain ownership or equity interests in positions in accounts, which is the same as in existing regulation 150.4(b); and (2) an aggregation requirement for a person who holds or controls positions in more than one account that employ substantially identical trading strategies, which is new under the final rule. The exemptions are in rules 150.4(b)(1) to (b)(8), and apply only to persons who fall within the first category of persons who must aggregate – i.e., persons subject to rule 150.4(a)(1). The exemption notice filing process is in rules 150.4(c) and (d). In rule 150.4(e), the Commission delegates authority over

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<sup>312</sup> See CL-Working Group Feb 10; CL-CME Feb 10; CL-SIFMA AMG Feb 10; CL-FIA Feb 6; CL-FIA Nov 13; CL-COPE Feb 10. Also, the Proposed Rule included a discussion of comments on costs related to the now-vacated Part 151 received prior to the 2013 proposal. See Proposed Rule, 78 FR at 68971.



aggregation and exemption related duties to the Director of the Division of Market Oversight.

There are eight exemptions. Three of them are largely the same as in existing regulations: an exemption for limited partners, shareholders, or other pool participants; an exemption for FCMs that hold certain accounts; and an exemption for independent account controllers that control trading by certain accounts or positions.<sup>313</sup> Five of the exemptions are new in the final rule. There is an exemption from aggregation of the positions and accounts of owned entities if the owner meets certain conditions intended to ensure independence of trading.<sup>314</sup> There is exemptive relief for persons who hold positions or accounts for the purpose of underwriting, and for certain broker-dealers.<sup>315</sup> There also is a violation-of-law exemption for persons who must not share trading information to avoid violating state or federal laws, or the law of a foreign jurisdiction.<sup>316</sup> Finally, there is an exemption that relieves persons who are affiliated with a person who has already filed an exemption notice from filing a duplicative exemption notice with the Commission.<sup>317</sup>

Persons seeking an exemption under most, but not all, of the exemptive categories must file a notice with the Commission to obtain relief from the aggregation requirement. Persons required to file a notice include the following: certain principals or affiliates of commodity pool operators; persons with ownership or equity levels of 10 percent or greater; independent account controllers, and persons who do not share trading

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<sup>313</sup> See rules 150.4(b)(1), (b)(3) and (b)(4), respectively. See also existing regulations 150.4(c), 150.4(d) and 150.3(a)(4), respectively.

<sup>314</sup> See rule 150.4(b)(2).

<sup>315</sup> See rules 150.4(b)(5) and (b)(6), respectively.

<sup>316</sup> See rule 150.4(b)(7).

<sup>317</sup> See rule 150.4(b)(8).

information to avoid violating laws.<sup>318</sup> The notice must describe the relevant circumstances that warrant disaggregation, and have a senior officer’s certification.<sup>319</sup> The relevant circumstances that may warrant disaggregation are described in rule 150.4(b)(2)(i)(A)-(E) and include the following four factors for the owner entity and the owned entity:<sup>320</sup> lack trading-decision knowledge; trade through separately developed and independent trading systems; possess and enforce written procedures to preclude each from having knowledge of, gaining access to, or receiving data about, trades of the other; do not share employees that control the trading decisions of the owned entity or owner; and do not have a risk management system that permits the sharing of trades or trading strategy.

The Commission also is finalizing definition changes to the term “eligible entity” in rule 150.1(d), and “independent account controller” in rule 150.1(e). These changes reorganize where the defined terms are located in the Commission’s regulations, and clarify that they apply not only to limited partnerships (as in the existing regulation), but also to limited liability companies and other equivalent corporate structures. The Commission believes that these definition changes, in and of themselves, have no cost-benefit concerns; their cost-benefit impact relates to implementing the exemptions.

## 2. Benefits

The purpose of requiring positions to be aggregated among affiliated and otherwise connected entities is to prevent evasion of prescribed position limits through

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<sup>318</sup> See rule 150.4(c)(1).

<sup>319</sup> See rules 150.4(c)(1)(i), (ii) and 150.4(b)(2)(ii).

<sup>320</sup> These factors apply to the owned entity to the extent that the owner is or should be aware of the activities and practices of the owned entity. The factors also apply to any other entity that the owner must aggregate, again to the extent the owner is or should be aware of its activities and practices. See rule 150.4(b)(2).

coordinated trading. Because the same reasoning applies to a person who holds or controls positions in more than one account or pool with substantially identical trading strategies, the final rule includes a new provision to require aggregation in these circumstances. The Commission believes that the new requirement to aggregate positions under substantially identical trading strategies will provide benefits by helping to prevent evasion of the position limits.

The Commission also recognizes that an overly restrictive or prescriptive aggregation policy may result in unnecessary burdens or unintended consequences. Therefore, the final rule adopts five new exemptions from the aggregation requirement, as described above. The Commission believes that providing these exemptions will mitigate these burdens and consequences in situations where the risks of coordinated trading are low. Thus, the Commission believes the final rule provides benefits to market participants who would have been subject to such burdens and consequences, while at the same time maintaining an aggregation requirement that is sufficient to maintain the benefit of preventing evasion.

The unnecessary burdens and unintended consequences that could arise from an overly restrictive or prescriptive aggregation policy could take the form of reduced liquidity because the imposition of aggregation requirements on entities that are not susceptible to coordinated trading would restrict their ability to trade commodity derivatives contracts if the aggregation requirements brought them close to the applicable limits. The Commission also recognizes that requiring passive investors to aggregate their positions may potentially diminish capital investments, or interfere with existing decentralized business structures.

The following example illustrates how the final rule is expected to provide benefits by allowing new exemptions to the aggregation requirement. In this example, Entity A seeks to pursue a business or investment strategy that involves the use of futures transactions. Before proceeding, Entity A must consider whether the futures transactions would cause it to exceed any applicable position limit. Under the aggregation requirement in current regulations, which has only limited exceptions, Entity A's decision of whether to proceed could depend on the futures transactions of its subsidiaries or other entities whose positions it is required to aggregate. If one such entity has significant positions in place, then Entity A may be prevented from entering into the desired transactions, because the aggregation of Entity A's positions with the positions of the other entity would exceed a position limit.

The final rules permit Entity A to seek disaggregation relief for the positions of certain of its subsidiaries and potentially other entities. Thus, under the final rules Entity A will have more flexibility to put in place a management structure that allows Entity A to make business and investment decisions independently of its subsidiaries and other potentially aggregated entities so long as applicable criteria (which relate to independent decision making and other indications of separateness) are met. This is beneficial to Entity A because it can focus its business and investment decisions on its own business needs. If disaggregation relief were not available to Entity A, then the requirement to aggregate other entities' positions might unnecessarily distort Entity A's business and investment decisions by requiring Entity A to consider factors that do not relate directly to those decisions. So by establishing exemptive relief that is available to market participants that take steps to establish independent decision making and separateness –

for instance, the demonstration of no shared control over trading – potential negative effects, such as impediments to sound decision making, will be reduced.

The exemptions added by the final rules also will benefit market participants by mitigating their compliance burdens associated with meeting the aggregation requirement as well as position limits more generally. Eligible market participants will not have to establish and maintain the infrastructure necessary to aggregate positions across affiliated entities where an exemption is available. Further, an eligible entity with legitimate hedging needs and whose aggregated positions are above the position limits thresholds in the absence of any exemption will have the option of applying for an aggregation exemption (if it meets the stated criteria) instead of applying for a bona fide hedging exemption. In other words, an eligible entity will have the benefit of being able to choose the exemption it deems appropriate, and in many cases the exemption from aggregation, which requires only a notice filing, may be less costly to obtain than other exemptions from position limits.

The final rules also provide legal consistency for those persons that own multiple entities with multiple ownership or equity interest levels. Because the final rules treat all persons that possess at least a 10 percent ownership or equity interest in another entity (other than persons with an interest in a pooled account subject to rule 150.4(b)(1)) in the same way for purposes of receiving exemptive relief from the Commission's aggregation requirement, there is a unified exemptive framework. This will reduce confusion and further mitigates the burdens facing market participants. Consider, for example, a parent-holding company that has different levels of ownership or equity interest in its various subsidiaries. Under the final unified framework, it may establish and maintain one

notice-filing system for the purpose of obtaining aggregation exemptions for any or all of these subsidiaries.

The Commission also has reduced, consistent with regulatory objectives, the administrative and compliance burden of filing the notice required to receive an exemption. For example, for the violations-of-law exemption, the Commission will allow a memorandum of law prepared by internal counsel instead of a formal opinion. This reduces legal costs and is a benefit available to market participants. Finally, the Commission recognizes the benefits of notice filing. This will result in reduced administrative and compliance costs given that updates will be necessary only when there are material changes.

### 3. Costs

The Commission recognizes that entities subject to the Commission's aggregation policy in rule 150.4, including entities seeking to apply one of the existing or newly-provided exemptions, will incur direct costs. Such costs will include: (i) initially determining which owned entities, other persons, or transactions qualify for any of the exemptions from aggregation in rule 150.4(b); (ii) developing and maintaining a system of determining the scope of such exemptions over time; (iii) potentially amending current operational structures to achieve eligibility for such exemptions; (iv) preparing and filing notices of exemption with the Commission; and (v) developing a system for aggregating positions across entities, persons or transactions for which no exemption is available.

The Commission has also considered whether its proposed amendments expanding position limits<sup>321</sup> would result in an increase in the number of market

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<sup>321</sup> See Position Limits for Derivatives, 78 FR 75680 (December 12, 2013).

participants that will have to consider the effects of the Commission's aggregation policy, as compared to the number of market participants that are currently subject to position limits and potentially subject to aggregation.<sup>322</sup> If the proposed position limits are adopted, market participants would be required to aggregate the accounts and positions of owned entities and other aggregated entities that engage in the contracts and swap equivalents covered by the new position limits. Thus, the Commission's adoption of the proposed position limits would mean that the aggregation requirement in the final rule (even though it largely continues the aggregation requirement in the existing regulations) would apply to new market participants who have not previously been subject to position limits or the aggregation requirement.<sup>323</sup> The Commission has considered the costs that these market participants will face.

Many of these costs – such as building out new compliance systems – would be attributable to complying with position limits that may be adopted in the future and not with the final rule adopted here.<sup>324</sup> However, the Commission has considered that as market participants become subject to position limits or subject to position limits

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<sup>322</sup> See generally Proposed Rule, 78 FR at 68970, and Supplemental Notice, 80 FR at 58375.

<sup>323</sup> The Commission notes that market participants that are currently subject to the aggregation requirement in the existing regulations should have already a system in place for aggregating positions across owned entities or as otherwise required. Further, entities that have been transacting in futures markets have been subject to these aggregation requirements for decades, and have extant operational structures that are appropriate for their trading and other activities. Given these considerations, the Commission believes that for market participants that are currently subject to position limits (and, potentially, the aggregation requirement) prior to any adoption of new position limits, these final rules do not increase significantly the costs of compliance as compared to the status quo – that is, the aggregation requirements of existing part 150 of the Commission's regulations.

<sup>324</sup> The adoption of the proposed position limits for 28 exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts would be pursuant to the requirements of CEA section 4a(a)(5). See Position Limits for Derivatives, 78 FR 75680 (December 12, 2013). Thus, costs resulting from this statutory requirement and not the Commission's discretion are not subject to the consideration of costs and benefits required by CEA section 15(a). The costs and benefits attributable to the specific position limit levels that may be adopted by the Commission would be considered in the rulemaking establishing those limits.

applicable to a wider scope of their derivatives activities, the market participants may face more complex situations involving owned entities or other entities potentially subject to the aggregation requirement. For example, if the scope of the position limits expands, interpretation and application of the criteria for disaggregation relief in rule 150.4(b)(2) may become more complex, even though these criteria are largely the same as criteria previously applied with respect to the exemption used by eligible entities using an IAC.<sup>325</sup> The Commission has considered the potential for these costs but cannot quantify them, because the costs that would be incurred by each market participant will depend upon its management and corporate structure, its trading practices, its information-sharing practices and other factors specific to the market participant.

The Commission has also considered that a large part of the final rule (in particular, paragraphs (2), (5), (6) and (7) of rule 150.4(b)) adds potential exemptions from the aggregation requirement that were not available under the existing regulations. While market participants may incur some costs in determining whether to use these newly-available exemptions and in filing the related notices, the market participants are also free not to use the exemptions if the costs of doing so are too high. In other words, if the costs attributable to paperwork and compliance practices that are necessary to take advantage of one of these exemptions do not make economic sense, market participants will not avail themselves of the exemptions under this rulemaking.

The Commission understands that there will be some costs to investors in commodity pools in aggregating positions under rule 150.4(a)(2), which is a newly adopted requirement to aggregate the positions of accounts or pools with substantially

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<sup>325</sup> See footnote 118 and accompanying text, above.



identical trading strategies. First, investors may not be able to easily determine which positions are held by a particular pool. Furthermore, the investors may not be able to easily determine their percentage ownership or equity interest in a pool that is open-ended and allows investors to continuously buy and redeem shares. The Commission is unable to quantify the effect of this rule because there are varying factors such as complicated trading strategies and changing ownership levels within a pool. Nonetheless, the Commission recognizes that there will be costs associated with the aggregation requirement of this rule.

In addition, DCMs and SEFs will be required to conform their aggregation policies, if their rules do not conform to the Commission's aggregation policy already. As noted above, the requirement to aggregate the positions of accounts or pools with substantially identical trading strategies, as well as the potential application of the aggregation requirement to a broader scope of positions and market participants, may increase the complexity of applying the aggregation requirement. The Commission recognizes that this complexity may increase costs for DCMs and SEFs to enforce their aggregation policies, but for the reasons noted above the Commission cannot quantify these costs at this time. The actual costs will depend on, among other things, the extent to which market participants may become subject to position limits and the characteristics of their corporate structures and trading practices. On the other hand, the Commission understands that some DCMs have made conforming rule changes already. In these cases, there are no incremental costs to consider.

The Commission believes that the final rules will decrease costs by providing market participants new options to elect an exemption and obtain relief from the

aggregation requirements. Consequently, the main direct costs associated with the changes to rule 150.4, relative to the standard of existing regulation 150.4, will be those incurred by entities as they determine whether they may be eligible for the final exemptions, if they modify their management or corporate structures or trading practices to comply with the exemptions, and if they make subsequent exemption filings for material changes. These costs will apply to market participants that pursue exemptions because they are a principal or affiliate of an operator of a pooled account; person with a 10 percent or greater owner or equity interest in another entity; a certain type of FCM; a certain type of independent account controller; or a person who must share information to avoid a violation of law.

The Commission believes there will be insignificant costs, if any, for persons electing to take the underwriting and broker-dealer exemptions. These groups are not required to file exemption notices under rule 150.4(c). As a result, the cost these persons will incur will be those dedicated to determining whether they are eligible for the exemption.

There also will be a cost-savings to entities affiliated with an entity who has already filed for an exemption under existing regulation 150.4. The Commission has offered affiliated entities greater relief by affording them an opportunity under rule 150.4(b)(8) to reduce administrative costs because they will not need to file a notice if their affiliated entity has filed an exemption notice previously and updates the previous filing to include the affiliated entities. While there will be some associated costs to monitor records of notices filed by affiliated entities and make the updates, the

Commission expects those costs will be small and will likely decline over time as tracking systems are maintained and automated.

In short, the direct costs of the final rules are difficult to quantify in the aggregate because such costs are heavily dependent on each entity's characteristics. In other words, costs vary according to an entity's current systems, its corporate structure, its use of derivatives, the specific modifications it will implement in order to qualify for an exemption, and other circumstances. The Commission, nevertheless, believes that market participants will choose to incur the costs of qualifying for and using the exemptions in the final rules when doing so is less costly than complying with position limits. Thus, by providing these market participants with a lower cost alternative (i.e., qualifying for and using the exemptions) the final rules may ease overall compliance burdens resulting from position limits.

There is an inherent trade-off between the benefits arising from aggregation exemptions in certain circumstances and maintaining the effectiveness of the Commission's position limits. The Commission believes that it has tailored the exemptions sufficiently to circumstances where the exemptions should not weaken the integrity of the Commission's position limits significantly, because, for instance, the exemptions apply only to accounts that pose a low risk of coordinated trading.

In accordance with the Paperwork Reduction Act the Commission has estimated the costs of the paperwork required to claim the final exemptions. As stated in Section III.C., below, the Commission estimates that 240 entities will submit a total of 340 responses per year and incur a total burden of 6,850 labor hours at a cost of approximately \$1,096,000 annually to claim exemptive relief under regulation 150.4.

The Commission also considers the cross-border implications of this rulemaking. The Commission believes that the costs might be slightly higher for entities that conduct business in both domestic and foreign jurisdictions. Multi-jurisdictional entities will likely need to consider the implications of memoranda of understanding between the Commission and foreign regulators as well as non-U.S. privacy laws that might apply to them. The Commission believes, however, that while there may be costs for initial assessments, these costs will decline over time for entities as they gain more experience with the aggregation requirements discussed herein.

#### 4. Comments

The Commission received several comments on cost-benefit issues in response to the Proposed Rule and the Supplemental Notice. One commenter argued that market participants faced the burden of building compliance systems and programs to (i) capture the information necessary to determine whether they may exceed position limits and (ii) avoid violating such limits on an intraday basis. The commenter believed that the number of potential market participants at risk of violating limits “is likely significantly larger” than the number of those who actually exceed limits, and the obligation to aggregate where there is currently no information sharing increases costs associated with aggregation.<sup>326</sup>

As noted above, the Commission has considered that the requirement to aggregate the positions of accounts or pools with substantially identical trading strategies, along with the potential application of the aggregation requirement to a broader scope of positions and market participants, may increase the complexity of applying the

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<sup>326</sup> See CL-Working Group Feb 10.

aggregation requirement. On the other hand, the Commission believes that it is important to continue to apply the aggregation requirement in the existing regulation (and to add the aggregation requirement related to substantially identical trading) in order to forestall evasion of the position limits through coordinated trading and to close potential loopholes, as discussed above. To the extent a market participant incurs costs in determining whether to seek an exemption or to comply with an exemption provided in the final rule, the market participant could avoid those costs if they are not sensible in relation to the benefits of using the exemption.

Another commenter asserted that the Commission's cost-benefit consideration of the proposed aggregation rules was inadequate, including for investors applying the substantially identical trading strategies aggregation requirement in rule 150.4(a)(2) to their holdings in multiple funds or funds-of-funds. The commenter also expressed that the Commission did not consider the costs for DCMs and SEFs to implement aggregation standards for all derivatives that would have to conform with proposed rule 150.4. These would include the costs of validating and approving aggregation-related notice filings made under proposed rule 150.4(c).<sup>327</sup>

Regarding the costs faced by investors in multiple funds or funds-of-funds, this rulemaking considers these costs qualitatively but not quantitatively, because quantitative costs depend upon the specific characteristics and activities of market participants – for example, the extent to which investors have to aggregate pro rata interests in multiple funds or funds-of-funds. The Commission recognizes that these costs may be significant in some situations, such as where a single investor transacts in derivatives subject to

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<sup>327</sup> See CL-CME Feb 10.

position limits through multiple entities and funds. As noted in the discussion of costs in Section III.A.3., above, investors may not be able to determine easily which positions are held by an underlying fund or their precise percentage interests in funds.

However, the Commission has determined that the requirements resulting in these costs are appropriate in order to prevent evasion of the position limits through coordinated trading. For example, as noted above in section II.H.3., in the absence of rule 150.4(a)(2) the exemption in rule 150.4(b)(1) would permit an investor to separate a large position in a given commodity derivative into positions held in various funds that have substantially identical trading strategies. As a practical matter, if an investor's positions are near position limits, the investor could consider the merits of holding its positions in a single fund as compared to holding the positions in multiple funds. The investor might elect to hold its positions in a single fund instead of through multiple funds, in order to avoid the requirement under rule 150.4(a)(2) to aggregate the multiple holdings. Of course, the investor would have to comply with position limits whether it holds its positions in a single fund or in multiple funds.

The discussion of costs in Section III.A.3., above, also covered costs to DCMs and SEFs that will be required to conform their aggregation policies to the Commission's aggregation policy. Moreover, the Commission had discussed this issue in the Proposed Rule, when it noted that because the Commission's aggregation rules would be precedent for aggregation rules enforced by DCMs and SEFs, it is important that the aggregation rules set out, to the extent feasible, bright line rules that are capable of easy application in a wide variety of circumstances, without being susceptible to circumvention.<sup>328</sup> The

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<sup>328</sup> See Proposed Rule, 78 FR at 68956, n. 103.

Commission notes that proposed rule 150.4(c)(2), which required a finding as to whether an applicant has satisfied the conditions for an exemption, is not being adopted. This should reduce the costs to DCMs and SEFs in reviewing filings made under rule 150.4(c), which was a concern to the commenter.

One commenter claimed that when considering the costs and benefits of its proposed owned entity aggregation rules, the Commission assumes a cost-benefit baseline that requires position aggregation based solely on ownership, regardless of the existence of common control.<sup>329</sup> The commenter goes further to say that this is an inappropriate baseline, because neither the Commission nor DCMs currently require the aggregation of owned entity positions regardless of the existence of common control, and also because speculative positions outside of the spot month have not been subject to position limits in 19 out of the 28 “referenced contract” markets.<sup>330</sup> “Aggregating non-spot-month positions of entities in which passive investors make investments presents considerable new challenges, which not been adequately considered,” the commenter stated.<sup>331</sup>

In response to this commenter, the Commission reiterates that the baseline is existing regulation 150.4, which does require aggregation based solely on ownership, regardless of the existence of common control.<sup>332</sup>

Also, as noted previously, the Commission has considered that the requirement to aggregate the positions of accounts or pools with substantially identical trading strategies, as well as the potential application of the aggregation requirement to a broader scope of

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<sup>329</sup> See CL-SIFMA AMG Feb 10.

<sup>330</sup> See *id.*

<sup>331</sup> See *id.*

<sup>332</sup> See the discussion in Section II.0, above.

positions and market participants, may increase the complexity of applying the aggregation requirement. The Commission understands that passive investors may be among those market participants that are affected by the new requirements. In response to this commenter's concerns, the Commission notes that passive investors should be able to qualify for the exemption from aggregation in rule 150.4(b)(2), because if the investor were passive it would meet the conditions for that exemption, which relate to an absence of coordinated trading. Thus, rule 150.4(b)(2) will mitigate the burdens on passive investors.<sup>333</sup>

The commenter also criticized the exemption for ownership interests in rule 150.4(b)(2) because it would not extend to all ownership interests, and would require a “burdensome” notice filing in all investment circumstances, despite the absence of any common trading control, “for no apparent benefit.” The commenter noted that passive investors in a commodity pool that are not affiliated with the pool operator would not, under the exemption in proposed rule 150.4(b)(1), be required to submit a notice filing to disaggregate the positions of pools in which they have invested, “regardless of their ownership interest in the pool,” and the Proposed Rule provides no reason why passive investors in owned entities should not have at least the same degree of deference.<sup>334</sup>

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<sup>333</sup> The Commission believes that the newly added exemption in rule 150.4(b)(2) will also mitigate the concerns that this commenter expressed about undue costs on passive investors that have no control over or knowledge of the commodity derivatives trading activities of the owned entities in which they invest. See CL-SIFMA AMG Feb 10. In the absence of such control or knowledge, the investor would be eligible for an exemption from the aggregation requirement. Thus, it is not the case, as the commenter argued (see id.), that the owned entity aggregation threshold at 10 percent is over-inclusive, or that it would require a purely passive investor to aggregate the positions of all entities in which the investor has beneficial equity ownership of 10 percent or more. Also, passive investors would not necessarily have to determine how owned entities transact in commodity derivatives, as the commenter argued. See id. Instead, passive entities would only have to ensure that they meet the requirements for the exemption in rule 150.4(b)(2), which the Commission expects they would, and file the notice required to use that exemption.

<sup>334</sup> See CL-SIFMA AMG Feb 10.



The Commission disagrees with the comment. The Commission does not believe that a notice filing is a heavy burden on any investor, passive or not, because the notice filing merely requires the investor to name the entities involved, describe the relevant circumstances that warrant disaggregation, and certify that the conditions in the applicable aggregation exemption have been met. As discussed above, the Commission believes that the notice filing requirement benefits the public and market participants because it will allow the Commission to monitor usage of the aggregation exemptions and receive notice of potential red flags that warrant further investigation.

Furthermore, the Commission believes that the difference in treatment between limited partners and similar pool participants in rule 150.4(b)(1), and owners of entities in rule 150.4(b)(2), is sensible. First, the Commission notes that rule 150.4(b)(1) continues the treatment of pool participants under the existing regulation. As the commenter said, rule 150.4(b)(1) does not include a notice filing requirement where the participant is not affiliated with the commodity pool operator. The Commission is comfortable that little additional benefit would be achieved by requiring a notice filing in this situation, because a separate entity is designated as the commodity pool operator (and may be subject to registration with the Commission). By contrast, rule 150.4(b)(2) applies to any type of owned entity. In this situation, the Commission believes that the costs incurred by the owner seeking an exemption to file a notice with the Commission are reasonable in view of the very large variety of corporate structures and management arrangements that may be in place. Given this variety, there are important benefits from a notice filing because the notices inform the Commission of the circumstances in which the exemption is being used and thereby permit the Commission to monitor use of the exemption.

The commenter also maintained that the Commission inadequately considered the costs and benefits of the proposed substantially identical trading strategies requirement at proposed rule 150.4(a)(2) , and that the requirement is unworkable in practice. The commenter noted, for example, “a \$10,000 investor in two \$1 billion commodity index mutual funds using the same index may have to aggregate the positions in those two \$1 billion mutual funds because they follow ‘substantially identical trading strategies.’” The commenter believed such an investor would have to implement a compliance program to prevent inadvertent violations of the position limits rules, which (in addition to imposing significant legal and operational obstacles) would impose costs many times the investor’s \$10,000 investment.<sup>335</sup>

The Commission disagrees with the commenter’s view that it inadequately considered the costs and benefits of the substantially identical trading strategies requirement. The Commission has explained that the requirement under proposed rule 150.4 is effected on a pro rata basis. That is, the terms of the rule require the owner to aggregate the positions that it (i.e., the owner) holds in the two commodity index mutual funds, not the positions of the funds themselves, so that in the commenter’s example the two holdings would be aggregated into one \$20,000 holding.<sup>336</sup> The Commission acknowledges that the determination of the owner’s pro rata interest in the number of contracts such accounts or pools are holding may create practical difficulties for the owner – in particular when the owner is unaware of the underlying positions of the

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<sup>335</sup> See *id.*

<sup>336</sup> The commenter described the holdings in dollar amounts. See *id.* The Commission notes however that the position limits generally are stated in terms of a number of contracts, not a dollar amount. To apply rule 150.4(a)(2), a person holding or controlling the trading of positions in more than one account or pool with substantially identical trading strategies must determine the person’s pro rata interest in the number of contracts such accounts or pools are holding.

account or pool. However, as discussed above the Commission believes that the requirement in rule 150.4(a)(2) provides important benefits by preventing circumvention of the aggregation requirements.

## 5. Alternatives

The Commission considered the cost-benefit implications of the following significant alternatives:

- Different ownership thresholds (e.g., 25 percent or 50 percent) for the aggregation requirement in rule 150.4(a)(1). As discussed in Section II.A.3.a, the Commission recognizes that a higher ownership threshold would presumably decrease the number of persons required to aggregate or seek exemptions from aggregation. Yet, there is uncertainty about how beneficial this reduction would be in reducing burdens and how harmful it would be in reducing the amount of information available to the Commission. Because of this uncertainty, the Commission has determined not to change the 10 percent threshold in effect under the current regulations.

- Aggregation on a basis pro rata to the ownership interest in the owned entity. Commenters suggested that Commission base the aggregation requirement on a pro rata ownership or equity interest.<sup>337</sup> Arguably, pro rata aggregation would more accurately reflect the positions owned by market participants and would not unnecessarily restrict the positions of market participants, while reducing the risk of an inadvertent position limits overage. The Commission has decided not to offer such an aggregation method. As explained above, while there are theoretical merits to a pro rata aggregation method as it would measure a market participant's ownership and equity levels more accurately,

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<sup>337</sup> See e.g., CL-FIA Feb 6; CL-COPE Feb 10; CL-SIFMA AMG Feb 10.

commenters did not offer suggestions on how such an exemption would work practically, especially when ownership and control may change on an inter-day basis. Nor did commenters provide information regarding the extent to which a pro rata approach would actually mitigate the aggregation requirement (e.g., how often entities which are subject to an aggregation requirement, and not eligible for an exemption, are owned at a level substantially below 100 percent). In such circumstances, implementing a pro rata aggregation standard would be expensive in terms of costs related to developing and maintaining systems that would connect multiple market participants (e.g., CPOs, beneficial owners), DCMs, and SEFs, to share information to perform pro rata calculations. The Commission believes a pro rata aggregation standard would be more costly than the standard the Commission is finalizing.

- No notice filing. A commenter suggested that the Commission eliminate the exemption notice filing for passive investors.<sup>338</sup> The Commission disagrees and has not added any new exemption from the notice filing. A one-time notice filing (with updates upon any material change) is not a substantial burden. It is noteworthy that, as discussed above, commenters made suggestions as to the timing and mechanics of the notice filing, but generally did not object to the requirement to make an exemption-notice filing. Moreover, as discussed above, a notice filing increases the Commission's and other market regulators' abilities to monitor usage of the aggregation exemptions and oversee market participants benefitting from the exemptions.

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<sup>338</sup> See CL-SIFMA AMG Nov 13.

- Addition of exemptions for passive investors such as pension plans and transitory ownership interests acquired through credit events.<sup>339</sup> As discussed above in Section II.A.3.d., the Commission believes that applying rules for specific treatment of particular situations or classes of entity would be complex and not justified by the potential benefits to the entities receiving different treatment. For example, the Commission believes that distinguishing “transitory” ownership from other forms of ownership would be more complicated than completing the notice required to obtain relief, and in such situations it is reasonable to expect that the notice filing would be made on a summary basis appropriate to the transitory situation. Similarly, application of definitional rules to delineate when a class of entities such as pension plans would not have to apply for an exemption from aggregation would be complex as compared to the notice filing that a pension plan could file to receive an exemption from aggregation.

#### 6. Section 15(a) Considerations

As the Commission has long held, position limits are regulatory tools that are designed to prevent concentrated positions of sufficient size to manipulate or disrupt markets. The aggregation of accounts for purposes of applying position limits represents an integral component that impacts the effectiveness of those limits. The Commission believes the final rules will preserve the important protections of the existing aggregation policy, but at a lower cost for market participants.

##### a. Protection of Market Participants and the Public

The Commission believes these final rules will not materially affect the level of protection afforded market participants and the public that is provided by the aggregation

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<sup>339</sup> See e.g., CL-SIFMA AMG Nov 13; CL-FIA Nov 13 CL-Working Group Nov 13.

policy reflected currently in regulation 150.4. Given that the aggregation standards are necessary to implement effective position limits, it is important that the final exemptions be sufficiently tailored to exempt from aggregation only those positions or accounts that pose a low risk of coordinated trading. The owned-entity exemption will maintain the Commission's historical presumption threshold of 10 percent ownership or equity interest and make that presumption rebuttable only where several conditions indicative of independence are met. This final exemption focuses on the conditions that impact trading independence. In addition, by providing an avenue to apply for relief when ownership is greater than 10 percent of the owned entity, the final rules will allow market participants greater flexibility in meeting the requirements of the position limits regulations, provided they are eligible to apply. The Commission believes that all of the exemptions will allow the Commission to direct its resources to monitoring those entities that pose a higher risk of coordinated trading and thus a higher risk of circumventing position limits. Furthermore, the exemptions will not significantly reduce the protection of market participants and the public that the Commission's aggregation policy affords.

b. Efficiency, Competition, and Financial Integrity of Markets

The Commission believes the final exemptions will reduce costs for market participants without compromising the integrity or effectiveness of the Commission's aggregation policy. An important rationale for providing aggregation exemptions is to avoid overly restricting commodity derivatives trading of affiliated entities not susceptible to coordinated trading. Such trading restrictions may potentially result in reduced liquidity in commodity derivatives markets, diminished investment by largely passive investors, or distortions of existing decentralized business structures. Thus, the

final exemptions help promote efficiency and competition, and protect market integrity by helping to prevent these undesirable consequences.

c. Price Discovery

The Commission expects the final rules to further the Commission's mission to deter and prevent manipulative behavior while maintaining sufficient liquidity for hedging activity and protecting the price discovery process. By relaxing aggregation requirements in circumstances not conducive to coordinated trading, the final exemptions may help improve liquidity by encouraging more market participation. Specifically, the Commission believes that these exemptions will help to encourage market participation on registered exchanges so that price discovery will not move to other market platforms where similar transactions could be effected, such as foreign boards of trade.

d. Sound Risk Management Practices

The imposition of position limits helps to restrict market participants from amassing positions that are of sufficient size to disrupt the operation of commodity derivatives markets. The final exemptions will allow affiliated entities to disaggregate their positions in circumstances that the Commission believes present minimal risk of coordinated trading with potential to disrupt market operations. The Commission believes that the final exemptions will not materially inhibit the use of commodity derivatives for hedging, as bona fide hedging exemptions are available to any entity regardless of aggregation of positions and exemptions from aggregation. Where there is little possibility of coordinating trading, the final rules facilitate sound risk management by permitting an entity to manage its risks where risks are being generated.<sup>340</sup>

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<sup>340</sup> See earlier discussion of the example involving Entity A in Section III.0., above.

e. Other Public Interest Considerations

The Commission did not identify any other public interest considerations related to the costs and benefits in the proposed exemptive relief to aggregation. No commenter on the Proposed Rule or the Supplemental Notice identified any other public interest consideration, either.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.<sup>341</sup> A regulatory flexibility analysis or certification typically is required for “any rule for which the agency publishes a general notice of proposed rulemaking pursuant to” the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b).<sup>342</sup> The requirements related to the proposed amendments fall mainly on registered entities, exchanges, FCMs, swap dealers, clearing members, foreign brokers, and large traders. The Commission has previously determined that registered DCMs, FCMs, swap dealers, major swap participants, eligible contract participants, SEFs, clearing members, foreign brokers and large traders are not small entities for purposes of the RFA.<sup>343</sup> While the

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<sup>341</sup> 44 U.S.C. 601 *et seq.*

<sup>342</sup> 5 U.S.C. 601(2), 603–05.

<sup>343</sup> See Policy Statement and Establishment of Definitions of “Small Entities” for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18619 (Apr. 30, 1982) (DCMs, FCMs, and large traders); Opting Out of Segregation, 66 FR 20740, 20743 (Apr. 25, 2001) (eligible contract participants); Position Limits for Futures and Swaps; Final Rule and Interim Final Rule, 76 FR 71626, 71680 (Nov. 18, 2011) (clearing members); Core Principles and Other Requirements for Swap Execution Facilities, 78 FR 33476, 33548 (June 4, 2013) (SEFs); A New Regulatory Framework for Clearing Organizations, 66 FR 45604, 45609 (Aug. 29, 2001) (DCOs); Registration of Swap Dealers and Major Swap Participants, 77 FR 2613 (Jan. 19, 2012) (swap dealers and major swap participants); and Special Calls, 72 FR 50209 (Aug. 31, 2007) (foreign brokers).



requirements under the proposed rulemaking may impact non-financial end users, the Commission notes that position limits levels apply only to large traders.

Accordingly, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the actions taken herein will not have a significant economic impact on a substantial number of small entities. The Chairman made the same certification in the Proposed Rule and the Supplemental Notice,<sup>344</sup> and the Commission did not receive any comments on the RFA.

C. Paperwork Reduction Act

1. Overview

The Paperwork Reduction Act (“PRA”), 44 U.S.C. 3501 et seq., imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number issued by the Office of Management and Budget (“OMB”). Certain provisions of the final rules will result in amendments to previously-approved collection of information requirements within the meaning of the PRA. Therefore, the Commission submitted to OMB for review, in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11, the information collection requirements in this rulemaking, as an amendment to the previously-approved collection associated with OMB control number 3038-0013.

Responses to this collection of information will be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act and 17

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<sup>344</sup> See Proposed Rule, 78 FR at 68973, and Supplemental Notice, 80 FR at 58377.

CFR part 145, titled “Commission Records and Information.” In addition, the Commission emphasizes that section 8(a)(1) of the Act strictly prohibits the Commission, unless specifically authorized by the Act, from making public “data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.” The Commission also is required to protect certain information contained in a government system of records pursuant to the Privacy Act of 1974.

On November 15, 2013, the Commission published in the Federal Register a notice of proposed modifications to part 150 of the Commission’s regulations (i.e., the Proposed Rule). The modifications addressed the policy for aggregation under the Commission’s position limits regime for futures and option contracts on nine agricultural commodities set forth in part 150, and noted that the modifications would also apply to the position limits regimes for other exempt and agricultural commodity futures and options contracts and the physical commodity swaps that are economically equivalent to such contracts, if such regimes are finalized. On September 29, 2015, the Commission published in the Federal Register a revision to the Proposed Rule (i.e., the Supplemental Notice).

The Commission final rule provides that all persons holding a greater than 10 percent ownership or equity interest in another entity could avail themselves of an exemption in rule 150.4(b)(2) to disaggregate the positions of the owned entity. To claim the exemption, a person needs to meet certain criteria and file a notice with the Commission in accordance with proposed rule 150.4(c). The notice filing needs to demonstrate compliance with certain conditions set forth in rule 150.4(b)(2)(i)(A)-(E).

Similar to other exemptions from aggregation, the notice filing is effective upon submission to the Commission (or earlier, as provided in rule 150.4(c)(2)), but the Commission may call for additional information as well as reject, modify or otherwise condition such relief. Further, such person is obligated to amend the notice filing in the event of a material change to the filing.

## 2. Methodology and Assumptions

It is not possible at this time to precisely determine the number of respondents affected by the final rule. The final rule relates to exemptions that a market participant may elect to take advantage of, meaning that without intimate knowledge of the day-to-day business decisions of all its market participants, the Commission could not know which participants, or how many, may elect to obtain such an exemption. Further, the Commission is unsure of how many participants not currently in the market may be required to or may elect to incur the estimated burdens in the future.

These limitations notwithstanding, the Commission has made best-effort estimations regarding the likely number of affected entities for the purposes of calculating burdens under the PRA. The Commission used its proprietary data, collected from market participants, to estimate the number of respondents for each of the proposed obligations subject to the PRA by estimating the number of respondents who may be close to a position limit and thus may file for relief from aggregation requirements.

The Commission's estimates concerning wage rates are based on 2013 salary information for the securities industry compiled by the Securities Industry and Financial Markets Association ("SIFMA"). The Commission is using a figure of \$160 per hour, which is derived from a weighted average of salaries across different professions from the SIFMA Report on Management & Professional Earnings in the Securities

Industry 2013, modified to account for an 1800-hour work-year, adjusted to account for the average rate of inflation in through April 2016. This figure was then multiplied by 1.33 to account for benefits<sup>345</sup> and further by 1.5 to account for overhead and administrative expenses, and rounded to the nearest ten dollars.<sup>346</sup> The Commission anticipates that compliance with the provisions would require the work of an information technology professional; a compliance manager; an accounting professional; and an associate general counsel. Thus, the wage rate is a weighted national average of salary for professionals with the following titles (and their relative weight); “programmer (average of senior and non-senior)” (15 percent weight), “senior accountant” (15 percent) “compliance manager” (30 percent), and “assistant/associate general counsel” (40 percent).

The Commission requested comment on its assumptions and estimates in the Proposed Rule and the Supplemental Notice,<sup>347</sup> but did not receive any comments.

### 3. Collections of Information

Rule 150.4(b)(2) requires qualified persons to file a notice in order to claim exemptive relief from aggregation. Further, rule 150.4(b)(2)(ii) states that the notice is to be filed in accordance with rule 150.4(c), which requires a description of the relevant circumstances that warrant disaggregation and a statement that certifies that the

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<sup>345</sup> The Bureau of Labor Statistics reports that an average of 32.8 percent of all compensation in the financial services industry is related to benefits. This figure may be obtained on the Bureau of Labor Statistics website, at <http://www.bls.gov/news.release/ecec.t06.htm>. The Commission rounded this number to 33 percent to use in its calculations.

<sup>346</sup> Other estimates of this figure have varied dramatically depending on the categorization of the expense and the type of industry classification used (see, e.g., BizStats at <http://www.bizstats.com/corporation-industry-financials/finance-insurance-52/securities-commodity-contracts-other-financial-investments-523/commodity-contracts-dealing-and-brokerage-523135/show> and Damodaran Online at <http://pages.stern.nyu.edu/~adamodar/pc/datasets/uValuedata.xls>. The Commission has chosen to use a figure of 50 percent for overhead and administrative expenses to attempt to conservatively estimate the average for the industry.

<sup>347</sup> See Proposed Rule, 78 FR at 68975 and Supplemental Notice, 80 FR at 58378.

conditions set forth in the exemptive provision have been met. Persons claiming these exemptions would be required to submit to the Commission, as requested, such information as relates to the claim for exemption. An updated or amended notice must be filed with the Commission upon any material change.

The final rule also extends relief available under rule 150.4(b)(4) to additional entities; so the Commission expects that, as a result of the expanded exemptive relief available to these entities, a greater number of persons will file exemptive notices under 150.4(b)(4). The Commission also expects entities to file for relief under rule 150.4(b)(7), which allows for entities to file a notice, including a memorandum of law, in order to claim the exemption.

Given the expansion of the exemptions that market participants may claim, the Commission anticipates an increase in the number of notice filings. However, because of the relief for “higher-tier” entities under rule 150.4(b)(8) the Commission expects that increase to be offset partially by a reduction in the number of filings by “higher-tier” entities. Thus, the Commission anticipates a net increase in the number of filings under regulation 150.4 as a result of the adoption of these final rules. The Commission believes that this increase will create an increase in the annual labor burden. However, because entities have already incurred the capital, start-up, operating, and maintenance costs to file other exemptive notices—such as those currently allowed for independent account controllers and futures commission merchants under regulation 150.4—the Commission does not anticipate an increase in those costs.

In the Supplemental Notice, the Commission estimated that 100 entities will each file two notices annually, and 25 entities will each file one notice annually,<sup>348</sup> under proposed rule 150.4(b)(2), at an average of 20 hours per filing. Thus, the Commission approximated a total per entity average burden of 36 labor hours annually.<sup>349</sup> At an estimated labor cost of \$120 per hour, the Commission estimated a cost of approximately \$4,320 per entity on average for filings under rule 150.4(b)(2). For this final rule, while the Commission maintains its estimates of the number of entities and number of filings, its update of the estimated labor cost to \$160 per hour, as noted above, increases the estimated cost to approximately \$5,760 per entity on average for filings under rule 150.4(b)(2).

As in the Proposed Rule and the Supplemental Notice, the Commission estimates that 75 entities will each file one notice annually under rule 150.4(b)(4) (proposed paragraph (b)(5)), at an average of 10 hours per filing. Thus, the Commission approximates a total per entity burden of 10 labor hours annually. At an estimated labor cost of \$160 per hour, the Commission estimates a cost of approximately \$1,600 per entity for filings under rule 150.4(b)(4).

And, again as in the Proposed Rule and the Supplemental Notice, the Commission estimates that 40 entities will each file one notice annually under rule 150.4(b)(7) (proposed paragraph (b)(8)), including the requisite memorandum of law, at an average

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<sup>348</sup> The Commission's estimate that 25 entities will each file one notice annually reflected those entities which had been estimated to each file one notice annually under proposed rule 150.4(b)(3), which the Commission is not adopting. Therefore, the Commission estimated that each of these 25 entities would file one notice annually under rule 150.4(b)(2), in place of the assumed filing under proposed rule 150.4(b)(3). See Supplemental Notice, 80 FR at 58378.

<sup>349</sup> That is, the Commission estimated that a total of 225 filings would be made each year. At 20 hours per filing, the total burden would be 4,500 labor hours, which divided among the 125 entities results in an average burden of 36 labor hours per entity.

of 40 hours per filing. Thus, the Commission approximates a total per entity burden of 40 labor hours annually. At an estimated labor cost of \$160 per hour, the Commission estimates a cost of approximately \$6,400 per entity for filings under rule 150.4(b)(7).

In sum, the Commission estimates that 240 entities will submit a total of 340 responses per year and incur a total burden of 6,850 labor hours. At the updated cost of \$160 per hour, this results in a cost of approximately \$1,096,000 annually in order to claim exemptive relief under rule 150.4.

#### List of Subjects in 17 CFR Part 150

Position limits, Bona fide hedging, Referenced contracts.

For the reasons discussed in the preamble, the Commodity Futures Trading Commission amends 17 CFR part 150 as follows:

#### PART 150 – LIMITS ON POSITIONS

1. The authority citation for part 150 is revised to read as follows:

Authority: 7 U.S.C. 6a, 6c, and 12a(5), as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

2. In §150.1, revise paragraphs (d), (e)(2), and (e)(5) to read as follows:

##### § 150.1 Definitions.

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(d) Eligible entity means a commodity pool operator; the operator of a trading vehicle which is excluded, or which itself has qualified for exclusion from the definition of the term “pool” or “commodity pool operator,” respectively, under § 4.5 of this chapter; the limited partner, limited member or shareholder in a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter; a commodity

trading advisor; a bank or trust company; a savings association; an insurance company; or the separately organized affiliates of any of the above entities:

(1) Which authorizes an independent account controller independently to control all trading decisions with respect to the eligible entity's client positions and accounts that the independent account controller holds directly or indirectly, or on the eligible entity's behalf, but without the eligible entity's day-to-day direction; and

(2) Which maintains:

(i) Only such minimum control over the independent account controller as is consistent with its fiduciary responsibilities to the managed positions and accounts, and necessary to fulfill its duty to supervise diligently the trading done on its behalf; or

(ii) If a limited partner, limited member or shareholder of a commodity pool the operator of which is exempt from registration under § 4.13 of this chapter, only such limited control as is consistent with its status.

(e) \* \* \*

(2) Over whose trading the eligible entity maintains only such minimum control as is consistent with its fiduciary responsibilities for managed positions and accounts to fulfill its duty to supervise diligently the trading done on its behalf or as is consistent with such other legal rights or obligations which may be incumbent upon the eligible entity to fulfill;

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(5) Who is:

(i) Registered as a futures commission merchant, an introducing broker, a commodity trading advisor, or an associated person of any such registrant, or



(ii) A general partner, managing member or manager of a commodity pool the operator of which is excluded from registration under § 4.5(a)(4) of this chapter or § 4.13 of this chapter, provided that such general partner, managing member or manager complies with the requirements of § 150.4(c).

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#### § 150.3 [Amended]

3. Amend § 150.3 as follows:

a. Remove the semicolon and the word “or” at the end of paragraph (a)(3) and add a period in their place; and

b. Remove paragraph (a)(4).

4. Revise § 150.4 to read as follows:

#### § 150.4 Aggregation of positions.

(a) Positions to be aggregated—(1) Trading control or 10 percent or greater ownership or equity interest. For the purpose of applying the position limits set forth in § 150.2, unless an exemption set forth in paragraph (b) of this section applies, all positions in accounts for which any person, by power of attorney or otherwise, directly or indirectly controls trading or holds a 10 percent or greater ownership or equity interest must be aggregated with the positions held and trading done by such person. For the purpose of determining the positions in accounts for which any person controls trading or holds a 10 percent or greater ownership or equity interest, positions or ownership or equity interests held by, and trading done or controlled by, two or more persons acting pursuant to an expressed or implied agreement or understanding shall be treated the same

as if the positions or ownership or equity interests were held by, or the trading were done or controlled by, a single person.

(2) Substantially identical trading. Notwithstanding the provisions of paragraph (b) of this section, for the purpose of applying the position limits set forth in § 150.2, any person that, by power of attorney or otherwise, holds or controls the trading of positions in more than one account or pool with substantially identical trading strategies, must aggregate all such positions (determined pro rata) with all other positions held and trading done by such person and the positions in accounts which the person must aggregate pursuant to paragraph (a)(1) of this section.

(b) Exemptions from aggregation. For the purpose of applying the position limits set forth in § 150.2, and notwithstanding the provisions of paragraph (a)(1) of this section, but subject to the provisions of paragraph (a)(2) of this section, the aggregation requirements of this section shall not apply in the circumstances set forth in this paragraph (b).

(1) Exemption for ownership by limited partners, shareholders or other pool participants. Any person that is a limited partner, limited member, shareholder or other similar type of pool participant holding positions in which the person by power of attorney or otherwise directly or indirectly has a 10 percent or greater ownership or equity interest in a pooled account or positions need not aggregate the accounts or positions of the pool with any other accounts or positions such person is required to aggregate, except that such person must aggregate the pooled account or positions with all other accounts or positions owned or controlled by such person if such person:

(i) Is the commodity pool operator of the pooled account;

(ii) Is a principal or affiliate of the operator of the pooled account, unless:

(A) The pool operator has, and enforces, written procedures to preclude the person from having knowledge of, gaining access to, or receiving data about the trading or positions of the pool;

(B) The person does not have direct, day-to-day supervisory authority or control over the pool's trading decisions;

(C) The person, if a principal of the operator of the pooled account, maintains only such minimum control over the commodity pool operator as is consistent with its responsibilities as a principal and necessary to fulfill its duty to supervise the trading activities of the commodity pool; and

(D) The pool operator has complied with the requirements of paragraph (c) of this section on behalf of the person or class of persons; or

(iii) Has, by power of attorney or otherwise directly or indirectly, a 25 percent or greater ownership or equity interest in a commodity pool, the operator of which is exempt from registration under § 4.13 of this chapter.

(2) Exemption for certain ownership of greater than 10 percent in an owned entity. Any person with an ownership or equity interest in an owned entity of 10 percent or greater (other than an interest in a pooled account subject to paragraph (b)(1) of this section), need not aggregate the accounts or positions of the owned entity with any other accounts or positions such person is required to aggregate, provided that:

(i) Such person, including any entity that such person must aggregate, and the owned entity (to the extent that such person is aware or should be aware of the activities and practices of the aggregated entity or the owned entity):

(A) Do not have knowledge of the trading decisions of the other;

(B) Trade pursuant to separately developed and independent trading systems;

(C) Have and enforce written procedures to preclude each from having knowledge of, gaining access to, or receiving data about, trades of the other. Such procedures must include security arrangements, including separate physical locations, which would maintain the independence of their activities;

(D) Do not share employees that control the trading decisions of either; and

(E) Do not have risk management systems that permit the sharing of its trades or its trading strategy with employees that control the trading decisions of the other; and

(ii) Such person complies with the requirements of paragraph (c) of this section.

(3) Exemption for accounts held by futures commission merchants. A futures commission merchant or any affiliate of a futures commission merchant need not aggregate positions it holds in a discretionary account, or in an account which is part of, or participates in, or receives trading advice from a customer trading program of a futures commission merchant or any of the officers, partners, or employees of such futures commission merchant or of its affiliates, if:

(i) A person other than the futures commission merchant or the affiliate directs trading in such an account;

(ii) The futures commission merchant or the affiliate maintains only such minimum control over the trading in such an account as is necessary to fulfill its duty to supervise diligently trading in the account;

(iii) Each trading decision of the discretionary account or the customer trading program is determined independently of all trading decisions in other accounts which the

futures commission merchant or the affiliate holds, has a financial interest of 10 percent or more in, or controls; and

(iv) The futures commission merchant or the affiliate has complied with the requirements of paragraph (c) of this section.

(4) Exemption for accounts carried by an independent account controller. An eligible entity need not aggregate its positions with the eligible entity's client positions or accounts carried by an authorized independent account controller, as defined in § 150.1(e), except for the spot month in physical-delivery commodity contracts, provided that the eligible entity has complied with the requirements of paragraph (c) of this section, and that the overall positions held or controlled by such independent account controller may not exceed the limits specified in § 150.2.

(i) Additional requirements for exemption of affiliated entities. If the independent account controller is affiliated with the eligible entity or another independent account controller, each of the affiliated entities must:

(A) Have, and enforce, written procedures to preclude the affiliated entities from having knowledge of, gaining access to, or receiving data about, trades of the other. Such procedures must include security arrangements, including separate physical locations, which would maintain the independence of their activities; provided, however, that such procedures may provide for the disclosure of information which is reasonably necessary for an eligible entity to maintain the level of control consistent with its fiduciary responsibilities to the managed positions and accounts and necessary to fulfill its duty to supervise diligently the trading done on its behalf;

(B) Trade such accounts pursuant to separately developed and independent trading systems;

(C) Market such trading systems separately; and

(D) Solicit funds for such trading by separate disclosure documents that meet the standards of § 4.24 or § 4.34 of this chapter, as applicable, where such disclosure documents are required under part 4 of this chapter.

(ii) [Reserved].

(5) Exemption for underwriting. A person need not aggregate the positions or accounts of an owned entity if the ownership or equity interest is based on the ownership of securities constituting the whole or a part of an unsold allotment to or subscription by such person as a participant in the distribution of such securities by the issuer or by or through an underwriter.

(6) Exemption for broker-dealer activity. A broker-dealer registered with the Securities and Exchange Commission, or similarly registered with a foreign regulatory authority, need not aggregate the positions or accounts of an owned entity if the ownership or equity interest is based on the ownership of securities acquired in the normal course of business as a dealer, provided that such person does not have actual knowledge of the trading decisions of the owned entity.

(7) Exemption for information sharing restriction. A person need not aggregate the positions or accounts of an owned entity if the sharing of information associated with such aggregation (such as, only by way of example, information reflecting the transactions and positions of a such person and the owned entity) creates a reasonable risk that either person could violate state or federal law or the law of a foreign

jurisdiction, or regulations adopted thereunder, provided that such person does not have actual knowledge of information associated with such aggregation, and provided further that such person has filed a prior notice pursuant to paragraph (c) of this section and included with such notice a written memorandum of law explaining in detail the basis for the conclusion that the sharing of information creates a reasonable risk that either person could violate state or federal law or the law of a foreign jurisdiction, or regulations adopted thereunder. However, the exemption in this paragraph shall not apply where the law or regulation serves as a means to evade the aggregation of accounts or positions. All documents submitted pursuant to this paragraph shall be in English, or if not, accompanied by an official English translation.

(8) Exemption for affiliated entities. After a person has filed a notice under paragraph (c) of this section, another person need not file a separate notice identifying any position or account identified in such notice filing, provided that:

(i) Such other person has an ownership or equity interest of 10 percent or greater in the person that filed the notice, or the person that filed the notice has an ownership or equity interest of 10 percent or greater in such other person, or an ownership or equity interest of 10 percent or greater is held in such other person by a third person who holds an ownership or equity interest of 10 percent or greater in the person that has filed the notice (in any such case, the ownership or equity interest may be held directly or indirectly);

(ii) Such other person complies with the conditions applicable to the exemption specified in such notice filing, other than the filing requirements; and

(iii) Such other person does not otherwise control trading of any account or position identified in such notice filing.

(iv) Upon call by the Commission, any person relying on the exemption in this paragraph (b)(8) shall provide to the Commission such information concerning the person's claim for exemption. Upon notice and opportunity for the affected person to respond, the Commission may amend, suspend, terminate, or otherwise modify a person's aggregation exemption for failure to comply with the provisions of this section.

(c) Notice filing for exemption. (1) Persons seeking an aggregation exemption under paragraph (b)(1)(ii), (b)(2), (b)(3), (b)(4), or (b)(7) of this section shall file a notice with the Commission, which shall be effective upon submission of the notice (or earlier, as provided in paragraph (c)(2) of this section), and shall include:

(i) A description of the relevant circumstances that warrant disaggregation; and

(ii) A statement of a senior officer of the entity certifying that the conditions set forth in the applicable aggregation exemption provision have been met.

(2) If a person newly acquires an ownership or equity interest in an owned entity of 10 percent or greater and is eligible for the aggregation exemption under paragraph (b)(2) of this section, the person may elect that a notice filed under this paragraph (c) shall be effective as of the date of such acquisition if such notice is filed no later than 60 days after such acquisition.

(3) Upon call by the Commission, any person claiming an aggregation exemption under this section shall provide such information demonstrating that the person meets the requirements of the exemption, as is requested by the Commission. Upon notice and opportunity for the affected person to respond, the Commission may amend, suspend,



terminate, or otherwise modify a person's aggregation exemption for failure to comply with the provisions of this section.

(4) In the event of a material change to the information provided in any notice filed under this paragraph (c), an updated or amended notice shall promptly be filed detailing the material change.

(5) Any notice filed under this paragraph (c) shall be submitted in the form and manner provided for in paragraph (d) of this section.

(6) If a person is eligible for an aggregation exemption under paragraph (b)(1)(ii), (b)(2), (b)(3), (b)(4), or (b)(7) of this section, a failure to timely file a notice under this paragraph (c) shall not constitute a violation of paragraph (a)(1) of this section or any position limit set forth in § 150.2 if such notice is filed no later than five business days after the person is aware, or should be aware, that such notice has not been timely filed.

(d) Form and manner of reporting and submitting information or filings. Unless otherwise instructed by the Commission or its designees, any person submitting reports under this section shall submit the corresponding required filings and any other information required under this part to the Commission using the format, coding structure, and electronic data transmission procedures approved in writing by the Commission. Unless otherwise provided in this section, the notice shall be effective upon filing. When the reporting entity discovers errors or omissions to past reports, the entity shall so notify the Commission and file corrected information in a form and manner and at a time as may be instructed by the Commission or its designee.

(e) Delegation of authority to the Director of the Division of Market Oversight.

(1) The Commission hereby delegates, until it orders otherwise, to the Director of the

Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority:

(i) In paragraph (b)(8)(iv) of this section to call for additional information from a person claiming the exemption in paragraph (b)(8) of this section.

(ii) In paragraph (c)(3) of this section to call for additional information from a person claiming an aggregation exemption under this section.

(iii) In paragraph (d) of this section for providing instructions or determining the format, coding structure, and electronic data transmission procedures for submitting data records and any other information required under this part.

(2) The Director of the Division of Market Oversight may submit to the Commission for its consideration any matter which has been delegated in this section.

(3) Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

Issued in Washington, DC, on December 6, 2016, by the Commission.

Christopher J. Kirkpatrick,

Secretary of the Commission.

NOTE: The following appendix will not appear in the Code of Federal Regulations.

#### **Appendix to Aggregation of Positions – Commission Voting Summary**

On this matter, Chairman Massad and Commissioners Bowen and Giancarlo voted in the affirmative. No Commissioner voted in the negative.

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